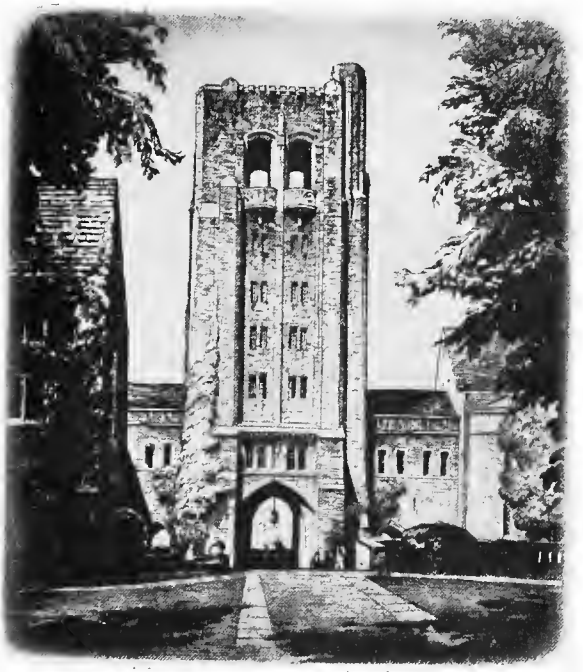

THE PRINCIPLES OF EQUITY.

PRINTED BY BALLANTYNE AND COMPANY
EDINBURGH AND LONDON

THE

PRINCIPLES OF EQUITY,

INTENDED FOR

THE USE OF STUDENTS

AND

THE PROFESSION.

BY THE LATE

EDMUND HENRY TURNER SNELL,

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

The Second Edition,

BY

J. R. GRIFFITH,

OF LINCOLN'S INN, ESQ., BARRISTER-AT-LAW.

LONDON:

STEVENS & HAYNES,

Law Publishers,

BELL YARD, TEMPLE BAR.

1872.

TO

WILLIAM LLOYD BIRKBECK,

READER ON EQUITY FOR THE INNS OF COURT,

AND

DOWNING PROFESSOR OF THE LAWS OF ENGLAND

IN THE UNIVERSITY OF CAMBRIDGE,

THE SECOND EDITION

OF

This Work

IS

BY PERMISSION DEDICATED.

PREFACE TO THE SECOND EDITION.

SINCE the appearance of the First Edition of this book, the Author has died, and left to his friends the regret that a life so assiduous and full of future promise has been prematurely cut short.

In preparing a Second Edition of the work, the Editor has attempted, while following as far as possible the Author's division of the subject, to bring it down to the present date, by reference to the more important changes effected by subsequent statute or case law, without, at the same time, unduly expanding its size, or overloading its pages with cases. The whole book has been carefully revised, and reference has been made to the latest authorities.

24 OLD SQUARE, LINCOLN'S INN,
May 1872.

PREFACE TO THE FIRST EDITION.

THE Author, in the course of his studies for the Bar, made so many notes on the Principles of Equity, and the cases in support of them, not only from his own private reading, but from the Lectures of that able and distinguished master, Mr Birkbeck, the Lecturer on Equity Jurisprudence, that it required but little trouble to recast and mould them into the form of a book. Venturing to think that the work may prove useful not only to the student but the practitioner, he ventures, with diffidence, to submit the result of his labours to the consideration of the profession.

5 ESSEX COURT, TEMPLE,
January 1868.

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REPORTS AND TEXT WRITERS,

WITH

ABBREVIATIONS.

Ad. & Ell.	Adolphus and Ellis.
Amb.	Ambler.
Anst.	Anstruther.
Atk.	Atkyns.
Ball & B.	Ball and Beatty (Irish).
B. & A.	Barnewall and Alderson.
B. & Ad.	Barnewall and Adolphus.
Barn. & Cress.	Barnewall and Cresswell.
Beav.	Beavan.
B. & S.	Best and Smith.
Bing. N. C.	Bingham, New Cases.
Bl. Com.	Blackstone's Commentaries.
B. & P.	Bosanquet and Puller.
Brod. & Bing.	Broderip and Bingham.
Bro. C. C.	Brown's Chancery Cases.
Bro. P. C.	Brown's Parliamentary Cases.
Ca. t. Talb.	Cases tempore Talbot.
Cha. Ca.	Cases in Chancery.
Co. Lit.	Coke upon Littleton.
Co. R.	Lord Coke's Reports.
Coote.	Coote on Mortgages.
Cowp.	Cowper.
Cr. & Ph.	Craig and Phillips.
Cro. Eliz.	Crokes' Reports, vol. i.
Dart's V. & P.	Dart's Vendors and Purchasers, 4th ed.
De G. F. & Jo.	De Gex, Fisher, and Jones.
D. G. J. & S.	De Gex, Jones, and Smith.

De G. M. & G.	De Gex, Macnaghten, and Gordon.
Dixon on Partn.	Dixon on Partnership.
Doug.	Douglas.
Drew.	Drewry.
Dr. & Walsh.	Drury and Walsh.
Dr. & War.	Drury and Warren.
Ell. Bl. & Ell.	Ellis, Blackburn, and Ellis.
E. & A.	Error and Appeal (Upper Canadian).
Exch. Rep.	Exchequer Reports.
Fonbl.	Fonblanque on Equity.
Fry on Spec. Perf.	Fry on Specific Performance.
Giff.	Giffard.
Gilb. Us.	Gilbert on Uses.
Gr.	Grant (Upper Canadian).
Hare.	
Hayes' Intro.	Hayes' Introduction to Conveyancing.
H. & Tw.	Hall and Twells.
H. & M.	Hemming and Miller.
Holt, N. P.	Holt, Nisi Prius Cases.
H. L. Cas.	House of Lords' Cases.
J. & H.	Johnson and Hemming.
J. & L.	Jones and Latouche (Irish).
Jac.	Jacob.
J. & W.	Jacob and Walker.
Jur. N. S.	Jurist, New Series.
K. & J.	Kay and Johnson.
Kay.	
Kee.	Keen.
L. J. N. S.	Law Journal, New Series.
L. R. Ch.	Law Reports, Chancery Appeal Cases.
L. R. Eq.	Law Reports, Equity Cases.
Lew. on Tr.	Lewin on Trusts.
L. C.	White and Tudor's Leading Cases in Equity, 3d ed.
Mad. & G.	Maddock and Geldart.
Madd.	Maddock.
	Maine's Ancient Law.
Mayne on Dam.	Mayne on Damages.
Mod.	Modern Reports.
Moll.	Molloy (Irish).
Mont. D. & D.	Montague, Deacon, and De Gex.
Moore P. C. C.	Moore's Privy Council Cases.
My. & Cr.	Mylne and Craig.

My. & K.	Mylne and Keen.
Nev. & Man.	Neville and Manning.
Peach. Mar. Settl.	Peachey on Marriage Settlements.
P. Wms.	Peere Williams.
Ph.	Phillips.
Prec. Ch.	Precedents in Chancery.
Roper, Husb. & Wife.	Roper's Husband and Wife.
Russ.	Russell.
Russ. & My.	Russell and Mylne.
Sand. Us.	Sanders on Uses.
Sch. & Lef.	Schoales and Lefroy (Irish).
Sel. C. C.	Select Chancery Cases.
Show.	Shower.
Sim.	Simons.
Sm. & Giff.	Smale and Giffard.
Sm. Man.	Smith's Manual of Equity.
Sp.	Spence's Equity.
St.	Story's Equity Jurisprudence.
Sudg. V. & P.	Sudgen's Vendors and Purchasers, 14th ed.
Sw. & Tr.	Swabey and Tristam.
Swanst.	Swanston.
	Tudor's Leading Cases in Real Property, 2nd ed.
T. & R.	Turner and Russell.
Vern.	Vernon.
Ves. & B.	Vesey and Beames.
Ves. Sr.	Vesey, Senior.
Ves. Jr.	Vesey, Juuior.
W. R.	Weekly Reporter.
Wms. on Exors.	Williams on Executors, 6th ed.
	Williams' Personal Property, 7th ed.
	Williams' Real Property, 9th ed.
Wilm.	Wilmot.
Y. & C. Exch. Ca.	Younge and Collyer's Exchequer Cases.
Y. & J.	Young and Jervis.

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... *v.* Steele, 99.
Wray's Trusts, Re, 329.
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... *v.* Bell, 441.
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Yallop, Ex parte, 99.
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Young *v.* English, 274, 431.

PRINCIPLES OF EQUITY.

INTRODUCTORY CHAPTER.

GENERAL REMARKS.

In treating of the subject of Equity, it is essential to distinguish the various senses in which that term is used. In the most general sense, we are accustomed to call that equity which in human transactions is founded on what is termed natural justice, in honesty and right, and which properly arises *ex æquo et bono*.[1] But it would be a great mistake to suppose that equity, as administered in our courts, embraces a jurisdiction so wide and extensive as that which would result from carrying into operation the principles of natural justice. There are many matters of natural justice wholly unprovided for, from the difficulty of framing any general rules to meet them, and from the doubtful nature of the policy of attempting to give a legal sanction to duties of imperfect obligation, such as charity, gratitude, and kindness.[2] A large proportion, therefore, of natural equity, in its widest sense, cannot be judicially enforced, but must be left to the conscience of each individual.

Are we then to infer that the equity of our Court of Chancery represents the residue of natural equity, or to put it conversely, the whole of that portion of natural

[1] St. 1. [2] St. 2.

equity which may be enforced by legal sanctions, and administered by legal tribunals? The slightest acquaintance with English jurisprudence will show us that, were we to arrive at this conclusion, we should ignore the claims of the common law and the statute law. Although, when we make use of the term common law, we use it as contradistinguished from equity technically so called, that circumstance should by no means blind us to the fact that, in the main, the common law is a system as much founded on the basis of natural justice and good conscience as our equity system; that if it has fallen short in its operation, its failure is rather to be attributed to defects in the *mode of administering* those principles than to any inherent weakness or deficiency of those principles themselves. Clearly, therefore, another large portion of enforcible equity, often enfeebled though it be by a defective mode of administration, is to be found in the common law. And, finally, we must look to the enactments of the legislature,[1] the statute law, as embodying and giving legal sanction to many of those principles of natural equity which, though capable of being administered by courts, have been omitted to be recognised as such, an omission arising from that tendency of all human institutions, founded on a body of principles, to assume a defined and solidified mass, refusing to receive further accessions, even though from a cognate source, and thus to become, after a time, incapable of expansion. Having thus mapped out the whole area of what is termed natural justice—having seen that a large portion of it cannot be enforced at all by civil tribunals —that another large section of it is administered in courts of common law, and a third part enforced by legislative enactments,—we are in a position to indicate, approximately, the province of equity technically so termed. Putting out of consideration all that part of natural equity sanctioned and enforced by

[1] Maine's Ancient Law, 29.

legislative enactments, equity then may be defined as that portion of natural justice which, though of such a nature as properly to admit of its being judicially enforced, was, from circumstances hereafter to be noticed, omitted to be enforced by the common law courts—an omission which was supplied by the Court of Chancery. In short, the whole distinction between equity and law may be said to be not so much a matter of substance or principle, as of form and history. Definition of equity.

Before proceeding further on the subject, the student must endeavour to put out of his mind those vague and incorrect definitions with which the early text writers abound. Thus, one writer says that it is the duty of equity "to correct or mitigate the rigour, and what, in a proper sense, may be termed the injustice of the common law." Another holds that "equity is a judicial interpretation of laws, which, presupposing the legislature to have intended what is just and right, pursues and effectuates that intention." Again, Lord Bacon lays it down, "*Habeant similiter Curiæ Prætoriæ potestatem tam subveniendi contra rigorem legis, quam supplendi defectum legis.*" And on the solemn occasion of accepting the office of Chancellor, he said, "Chancery is ordained to supply the law, and not to subvert the law.[1]

In the early history of English equity jurisprudence, there was probably much to justify the position taken by definitions such as these: that courts of equity were bounded by no certain limits or rules, but that they acted on principles of good conscience and natural justice, without much restraint of any sort. And, perhaps, had not the early Chancellors arrogated to themselves such extensive powers, the English equity system would never have attained its present dignity, and influ-

[1] St. 10–16.

ence for good. But whatever may have been the functions of equity in its origin, there can be no doubt that these definitions in no wise contain a correct exposition of the extent and sphere of equity in the present day. A court of equity is bound by settled rules as completely as a court of common law. "There are certain principles on which courts of equity act which are very well settled. The cases which occur are various, but they are decided on fixed principles. Courts of equity have, in this respect, no more discretionary power than courts of common law. They decide new cases as they arise, by the principles on which former cases have been decided, and may thus illustrate or enlarge the operation of those principles, but the principles are as fixed and certain as the principles on which the courts of common law proceed."[1] Again, Blackstone says, "The system of our courts of equity is a laboured connected system, governed by established rules, and bound down by precedents from which they do not depart."[2] Again, it is said that a court of equity determines according to the spirit of the rule, and not according to the strictness of the letter. But so also does a court of law. Both, for instance, are equally bound, and equally profess to interpret laws according to the true intent of the legislature. There is not a single rule of interpreting laws, whether equitably or strictly, that is not equally used by the judges in the courts both of law and equity; the construction must in both be the same; or if they differ, it is only as one court of law may also happen to differ from another. Each endeavours to fix and adopt the true sense of the law in question; neither can enlarge, diminish, or alter that sense in a single letter.[3] In *Gee* v. *Pritchard*,[4] Lord Eldon concisely says, "The

Courts of equity bound by settled rules and precedents.

Modes of interpreting laws the same in equity as at law.

[1] *Bond* v. *Hopkins*, 1 Sch. & Lef. 428–9.
[2] 3 Bl. 432.
[3] 3 Bl. 431.
[4] 2 Swanst. 414.

doctrine of this court ought to be as well settled and made uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each particular case." Finally, in a few words to indicate the distinction between equity and common law, "The systems of jurisprudence in our courts, both of law and equity, are *now* equally artificial systems, founded on the same principles of justice and positive law; but varied by different usages in the *forms* or *modes* of *their proceedings*."[1]

Having thus briefly indicated the position and province of equity, it will be necessary to trace the origin of the apparently anomalous distinction between the courts of common law and the courts of equity, a distinction which, with the exception of the civil law, has no parallel in the history of jurisprudence.

Origin of the jurisdiction of the Court of Chancery.

A great part of the foundation of the common law consists of Roman material. It is a well-known fact that, during the Anglo-Saxon and early Norman periods, the principles of the civil law were familiar to the clergy, the great repositories of learning in early times, who, being the expounders and administrators of the law, naturally enough imported into their decisions or expositions of it, many of the doctrines of the Roman code.[2] And early in the twelfth century, shortly after the discovery of an unmutilated copy of the Pandects, schools for the study of the civil law were established in England.

Civil law much resorted to.

For a considerable period English law continued to receive large accessions from the *civil law;* and there is reason to believe that had the process of amalgamation been allowed to proceed, equity as a system distinct from common law, would not have existed.

[1] 3 Bl. 434. [2] 1 Sp. 16.

Reasons of separation between the two systems.

But several circumstances prevented the complete incorporation of the principles of the Roman law with those of the English law.

Common law became a *lex scripta* too early.

1. It has always been held by the great oracles of the law, that the principles of the common law are founded on reason and equity; and so long as the common law was in the course of formation, and therefore continued to be a *lex non scripta*, it was capable—as indeed it has ever continued to be to some extent—of not only being extended to cases not expressly provided for, but which were within the spirit of the existing law, but also of having the principles of equity applied by the judges in their decisions, as circumstances arose which called for the application of such principles. This was more especially open to the judges as regards defences to actions which were not founded on writs, and were therefore under their own control. But in course of time a series of precedents was established by the decisions of the judges, which were considered as of almost equally binding authority on succeeding judges as were the acts of the legislature; and it became difficult to make new precedents without interfering with those which had already been established. Hence, though new precedents have ever continued to be made, the common law, to a great extent became a *lex scripta*, positive and inflexible; so that the rule of justice could not accommodate itself to every case, according to the exigency of right and justice.[1]

Roman law inapplicable to English tenures.

2. The Roman law was incapable of universal application, for the whole of the laws governing the tenure of land were founded on feudal principles, which were quite alien to the doctrines of the civil law.

3. In the reign of Edward III. the exactions of the

[1] 1 Sp. 321–22.

court of Rome had become odious to the king and people. Edward, supported by his parliament, resisted the payment of the tribute which his predecessors had been accustomed to pay to the court of Rome. A general distaste on the part of the laity of all ranks to everything connected with the Holy See had begun to spring up. The name of the Roman law, which in the previous reigns had been in considerable favour at court, and even with the judges, became the object of aversion. In the reign of Richard II. the barons protested that they never would suffer the kingdom to be governed by the Roman law, and the judges prohibited it from being any longer cited in the common law tribunals.[1]

Unpopularity of civil law—temp. Edw. III.

The result of this ill-judged measure tended to effect the very object sought to be avoided. It was found that the common law courts fell short of the performance of their judicial duties, and were incapable of meeting the growing legal wants of society. A fresh tribunal therefore of necessity arose, which took for its guidance the neglected principles of the civil law, and thus arose the equitable jurisdiction of the Court of Chancery.

4. Notwithstanding all these obstacles, the courts of common law might have become much more useful than they in fact did, had they not adopted an inelastic and cramping system of procedure. To the adoption of this inflexible form of procedure may be attributed chiefly, though concurrently with other causes noticed above, the rise and rapid progress of the Court of Chancery.

System of common law procedure defective.

According to the common law every species of civil wrong was supposed to fall within some particular class, and for each class an appropriate writ existed, or was supposed to exist. The writ was in common law actions the first step. Thus, if a man had suffered an injury, it was not competent to him to bring

Procedure by writs.

[1] 1 Sp. 346.

before a court of law the facts of the case, leaving it to the court to say whether the case was one deserving of redress; but he had first to determine within what class of wrong his case fell, and then to apply for the appropriate writ. The evil effects of this system operated in two modes.

Effects of procedure by writs.

1. Even where the facts were such as to bring the case of wrong within some one of the classes already recognised at common law, the injured suitor was exposed to the risk of selecting an improper writ, and failing in his action on that account. This was a fertile source of injustice until the Common Law Procedure Act of 1852, 15 and 16 Vict., cap. 76, sec. 3, enacted that it should not be necessary to mention any form of action in the writ of summons.[1]

Writs *in consimili casu.*

2. Another evil of the commou law procedure by writs was, that if the wrong committed did not fall within any known form of writ, the plaintiff was absolutely without a remedy at law. The system was incapable of expansion. At length, in the 13 Edw. I., a remedy was attempted. At that time actions at law in fact commenced with an original writ sued out of Chancery. The drawing up of these writs was a part of the business of the clerks in Chancery. An attempt was made to mitigate the latter of the two evils alluded to, by giving a larger discretion to the clerks in the framing of new writs. It was accordingly enacted in the 13 Edw. I., stat. 1, cap. 24, "whensoever from henceforth it shall fortune in the Chancery that in one case a writ is found, and in like case falling under like law and requiring like remedy is found none, the clerks of the Chancery shall agree in making the writ, or the plaintiffs may adjourn it until the next parliament, and let the cases be written in which they cannot agree, and let them refer them unto the next

[1] *Sharrod* v. *N.-W. R. Co.*, 4 Exch. Rep. 580.

parliament, and by agreement of men learned in the law let a writ be made, lest it should happen that the court should long time fail to minister justice unto complainants." This enactment, though well intended, proved wholly inadequate, for several reasons :—

(*a.*) The judges of the common law courts assumed exclusive jurisdiction to decide on the validity of these writs, disregarding the sanction of the Chancellor and his college of clerks ;[1] and based, as most of these new writs seem to have been, on precedents of the Roman formulæ, the common law judges refused to act on their authority.

(*b.*) The progress of society and civilisation gave rise, not only to new forms of action, but also to new forms of *defence*, for which no provision had been made,[2] and which necessarily therefore fell under the jurisdiction of the Chancellor.[3]

New defences unprovided for.

(*c.*) The statute permitted the framing of new writs in cases of "like law," or "like remedy," and cases very dissimilar arose, for which there could be no remedy.

Unusual cases arose.

When the common law judges could not or would not grant relief, the only course open to suitors was to petition the king in parliament or in council ; the sovereign, in those troubled times seldom without a foreign war or a rebellion at home to engage his whole attention, generally referred the matter to the "keeper of his conscience," the Chancellor; and finally, in the reign of Edward III., the Chancellor is recognised as a distinct judge empowered to give relief in cases which required extraordinary relief. That king, in the twenty-second

[1] 1 Sp. 325.
[2] 1 Sp. 325.
[3] See 17 & 18 Vic., c. 125, s. 83, as to equitable defences at common law.

Ordinance of 22 Edw. III. as to matters "of grace."

year of his reign, by an ordinance referred all such matters as were "of grace" to the Chancellor or Keeper of the Great Seal.[1] From this time suits by petition or bill, without any preliminary writ, became the common course of procedure before the Chancellor, on which being presented, if the case called for extraordinary remedy, a writ was issued by the command of the Chancellor, in the name of the king, summoning the defendant. Although in early times the limits of the Chancellor's extraordinary jurisdiction were but ill defined, and it often usurped the province of the common law courts, yet it is not difficult to recognise in the present system of equity jurisprudence the natural and logical development of those great equitable principles which were administered by the early clerical chancellors, the fathers of the system.

The preceding historical sketch will illustrate that mode of division which has been followed by most writers, and which has been here adopted, of classifying equity in relation to the common law, as having a jurisdiction, *exclusive*, *concurrent*, *or auxiliary*.

Exclusive jurisdiction.

I. Equity may be said to have jurisdiction absolutely or practically exclusive where there are particular rights which come within some general class of rights enforced at law, or capable of being judicially enforced; and yet there are no forms of action by which relief can or could be obtained in respect of such particular rights at law; as in cases of trusts, penalties, forfeitures.

Concurrent.

II. Equity has a concurrent jurisdiction with common law, where the law did not, or does not, afford *adequate* relief, or where no relief can be obtained at law except by circuity of action, or by multiplicity of suits; and complete justice can be done by a single

[1] 1 Sp. 337.

suit in equity, as in the cases of accident, mistake, fraud, specific performance, &c.

Auxiliary.

III. Equity has an auxiliary jurisdiction in those cases where the matter is most properly cognisable at law; but courts of law, from deficiency of administrative power or machinery, or defects in their procedure, are unable to procure that evidence which a court of equity can obtain by its more flexible and searching system of administration or procedure. In such cases equity interposes its procedure to aid the courts of law by providing such necessary evidence.[1]

Where equity cannot interfere.

Where it is clear that the courts of law could always afford adequate relief, without the aid of equity, without circuity of action and multiplicity of suits, and could take due care of the rights of all parties interested in the suit, equity has no jurisdiction.[2]

[1] St. 64 k.; 14 & 15 Vic., c. 99, s. 6; 17 & 18 Vic., c. 125, s. 50 & 51.

[2] St. 33; 2 Sp. 16.

CHAPTER II.

THE MAXIMS OF EQUITY.

In enumerating the following maxims of equity, it will manifest itself to the student that nothing like a logical division of them is possible. Each maxim often contains by implication what belongs to another. The cause of this incapability of logical division lies in the history of equity—that it arose not as one harmonious whole, the creation of one mind or one and the same period, but gradually developed in the course of five centuries, out of an idea vague and indefinite at first, to a comprehensive and admirable science. The ingenious student will find no difficulty in tracing almost every maxim or head of equity to that great maxim, the key-stone of the whole arch,—"Equity suffers no wrong without a remedy." But though the other maxims are necessarily postulated in the great maxim, yet each will merit a separate examination, for each expresses some peculiar function of equity, and serves to impress it on our memories by substituting for a dry term of nomenclature an active and comprehensive aphorism.

It is now proposed to enumerate and explain the most important maxims of equity, indicating briefly various heads of equity which rank under them :—

Maxims of equity.

1. Equity will not suffer a wrong without a remedy.
2. Equity follows the law.
3. Where there are equal equities the first in time shall prevail.
4. Where there is equal equity the law must prevail.
5. He who seeks equity must do equity.

6. He who comes into equity must come with clean hands.

7. *Vigilantibus non dormientibus, æquitas subvenit.*

8. Equality is equity.

9. Equity looks to the intent rather than the form.

10. Equity looks on that as done which ought to have been done.

11. Equity imputes an intention to fulfil an obligation.

1. *Equity will not suffer a wrong without a remedy.*— It will be evident that this maxim is at the foundation of a large proportion of equity jurisprudence as a suppletory system. But at the same time it must be remembered that the principle conveyed by the maxim must be understood with the following limitations,— it must be regarded as referring exclusively to rights which come within a class enforcible by law, or capable of being judicially enforced without occasioning a greater detriment or inconvenience to the public than would result from leaving them to be disposed of *in foro conscientiæ;* and it must also be understood to refer to cases where the party who is remediless at law has not sacrificed or lost his remedy by his own act or laches,[1] and to cases where there is no equal or superior adverse right. But not only will equity, within these prescribed limits, and where the law is wholly without remedy, aid a suitor, but it will also afford relief in many cases where the courts of law cannot, or originally did not, clearly give adequate and complete relief, at least without circuity of action or multiplicity of suits; or where the law cannot take due care of the rights of all parties interested in the property in litigation; as in cases of specific performance, injunction, suretyship, account.

1. Equity will not suffer a wrong without a remedy.

2. *Equity follows the law.*—This maxim has two meanings:— 2. Equity follows the law.

[1] St. 684 *a*, 684 *c*.

(*a.*) Equity is governed by the rules of law as to *legal* estates, rights, and interests.

(*b.*) Equity is regulated by the analogy of such legal rights and interests, and the rules of law affecting the same, in regard to *equitable* estates, rights, and interests, where any such analogy clearly subsists.

But the maxim in both its branches must always be taken with this limitation—that equity will suffer the rules of law to govern, and the course of law to proceed, so far as it can without sacrificing claims grounded on peculiar circumstances, as fraud, misrepresentation, which render it incumbent on a court of equity to interpose in accordance with the maxim previously mentioned, that equity will not suffer a wrong without a remedy.[1]

Rule of primogeniture.

(*a.*) As an illustration of the first part of this maxim, it is well settled that equity follows the law as to the rule of primogeniture, although that rule, in any particular instance, and in which it is so followed, may be productive of the greatest hardship towards all the younger members of a large family, who, in one sense, by the operation of the rule, may be left without any sort of provision, while the eldest son may be placed in a state of the greatest affluence. But these are not peculiar circumstances creating an equitable right to relief in favour of the younger son against the eldest son, and demanding the interposition of a court of equity. The mere absence or want of provision, a circumstance arising perhaps from the culpable neglect of the parent, can create no equity against the eldest son. He has the right to the descended or entailed estate, without any reference to the circumstances of the other members of the family. No relief could be

[1] Sm. Man. 14, 15.

given in such a case as this, without directly derogating from a rule of law, which a court of equity has no power to do. But if an eldest son should prevent his father from executing a will devising one of his estates to a younger brother, by promising to convey such estate to such younger brother, although that estate would at law descend to the eldest son, a court of equity would doubtless interpose and prevent the eldest son from asserting any claim to it.[1]

Again, in *Loffus* v. *Maw*,[2] a testator in advanced years, and in ill health, induced his niece to reside with him as his housekeeper, on the *verbal* representation that he would leave her certain property by his will, which he accordingly prepared and executed; but subsequently by a codicil revoked. The court directed that the trusts of the will in favour of the niece should be performed. It held that in cases of this kind, a representation that the property is to be given, even though by a revocable instrument, is binding; that it is the law of the court which makes it binding, although it be of the essence of the representation that the instrument is to be of a revocable nature.

Statutes of limitation.

(*b.*) Equity acts by analogy to the rules of law in relation to equitable titles and interests. Thus, although the statutes of limitation are in their terms applicable to courts of law only, yet equity, by analogy, acts upon them, and refuses relief under like circumstances. Equity always discountenances laches, and holds that laches is presumable in cases where it is positively declared at law. Thus, in cases of equitable title in land, equity requires relief to be sought within the same period in which an ejectment would lie at law;[3] and in cases of personal claims, it also requires relief to be sought within the period prescribed for

[1] St. 64.
[2] 3 Giff. 592.
[3] *Beckford* v. *Wade*, 17 Ves. 99.

personal suits of a like nature. And yet there are cases in which the statutes would be a bar at law, but in which equity would, notwithstanding, grant relief; and on the other hand, there are cases where the statutes would not be a bar at law, but where equity would, notwithstanding, refuse relief.[1]

The rule is subject to many exceptions.

In short, it may be correctly said that the maxim, that equity follows the law, is a maxim liable to many exceptions; and that it cannot be generally affirmed, that where there is no remedy at law in the given case, there is none in equity; or, on the other hand, that equity in the administration of its own principles, is utterly regardless of the law.[2] This part of the doctrine will be found so fully illustrated in the chapter on trusts, and in other chapters, that it is unnecessary to enlarge further in this place on the subject.

Qui prior est tempore, potior est jure.

3. *Qui prior est tempore, potior est jure.* Where equities are equal, the first in time shall prevail. This is a maxim often misunderstood. It has been understood by some as meaning, that as between persons having only equitable interests, *Qui prior est tempore, potior est jure*—but this proposition is far from being universally true. In fact, not only is it not universally true as between persons having only equitable interests, but it is not universally true even where their equitable interests are of precisely the same nature, and in that respect precisely equal, as in the common case of two successive assignments for valuable consideration of a reversionary interest in stock standing in the name of trustees, where the second assignee has given notice to the trustee, and the first has omitted it, the second has priority over the first.[3] Another form of stating the rule is thus: "As between persons having

[1] St. 64 *a*.
[2] St. 64 *b*.
[3] *Loveridge* v. *Cooper*, 3 Russ. 30.

only equitable interests, if their equities are equal, *Qui prior est tempore, potior est jure.* This explanation is not so obviously incorrect, yet, if scrutinised, it will be seen to involve a contradiction. For, when we talk of two persons having equal or unequal equities, in what sense do we use the word "equity?" For example, when we say that A. has a better equity than B., what is meant by that? It means only this—that, according to those principles of right and justice which a court of equity recognises and acts upon, it will prefer A. to B., and will interfere to enforce the rights of A. as against B.; and therefore it is impossible, strictly speaking, that two persons should have "equal equities," except in a case in which a court of equity would altogether refuse to lend its assistance to either party as against the other. If the court will interfere to enforce the right of one against the other on any ground whatever, say on the ground of priority of time, how can it be said that the "equities" of the two are equal; *i.e.*, in other words, how can it be said that the one has no better right to call for the interference of a court of equity than the other? The true rule may be thus stated—that, as between persons having only equitable interests, if such equities are *in all other respects* equal, *Qui prior est tempore, potior est jure*—that in a contest between persons having only equitable interests, priority of time is the ground of preference last resorted to; *i.e.*, that a court of equity will not prefer one to the other on the mere ground of priority of time, until it finds, on an examination of their relative merits, that there is no other sufficient ground of preference between them; or, in other words, that their equities are in all other respects equal; that if the one has on other grounds a better equity than the other, priority of time is immaterial.[1] A single case will for the present suffice to illustrate the application of this maxim. A.

True rule.

[1] *Rice* v. *Rice*, 2 Drew 73.

conveyed a piece of land to B. Part only of the purchase money was paid, and the vendor A. accordingly kept the conveyance as security for the rest. B. then sold the land to C., who did not require B. to produce the deeds of conveyance, and had no notice of A.'s lien for the purchase money. It was held that the equitable lien of A. for the purchase money must prevail over the legal estate of C. the purchaser without notice, as it was his duty to require the production of the deed, which, if he had done, would have led to a knowledge of the lien.[1]

4. Where there is equal equity, the law must prevail.

4. Where there is equal equity, the law must prevail. This maxim, with the one immediately preceding it, are intimately connected; each depends on the other for its complete elucidation; each is the supplement of the other. The maxim immediately under consideration may be thus briefly explained: if the defendant has a claim to the protection of the court equal to the claim which the plaintive has to call for the aid of the court, he who has the legal estate will prevail. The case of *Thorndyke* v. *Hunt*[2] furnishes a remarkable illustration of the application of this rule. The trustee of a sum of stock for T. was ordered, in a suit instituted by the *cestui que* trust, T., to transfer the money into court. The transfer was made, and the fund was treated as belonging to T.'s estate. The legal state, therefore, vested in the Accountant-General for the purposes of T.'s trust. It afterwards appeared that the trustee had provided himself with the fund for discharging himself from his personal liability to pay T.'s fund into court, by fraudulently misappropriating funds which he held in trust for B. The question was whether B. had a right to follow the money into court. It was held that he had not, for the following reasons:— That T. had no notice of the want of equitable title or honest right in the trustee to make this payment with

[1] *Peto* v. *Hammond*, 30 Beav. 495. [2] 3 De G. & Jo., 563.

B.'s money; that the transfer was for valuable consideration, because there was a debt due from the trustee for which he would have been liable by execution of his goods, or by other means; that therefore B.'s right or equity to follow the money being no greater than T.'s right to retain it, the circumstance that the legal title was held for T. by the Accountant-General was sufficient to create a preference in favour of T. This was, no doubt, a hard case, though B. was not altogether without remedy, for, of course, he could proceed against the defaulting trustee personally for the trust money.

Defence of purchase for valuable consideration without notice.

The most important class of cases in which these two maxims have received a practical application, are, as will be seen from the previous illustrations, those where a purchaser sets up the defence that he has purchased for valuable consideration without notice of the adverse title. The person setting up this plea thereby admits that on his purchase a good title did not pass to him: it likewise assumes a conflict between a legal and an equitable title; or between the holder of a title legal or equitable, and a person who is trying to assert an equity against him. It is evident from the nature of the case that the question cannot arise between two legal titles, for their co-existence in the same subject matter is impossible. Nor can the plea be used by a person having an equitable title against another having equal equity, who is prior in point of time. Having premised these remarks with regard to the general scope of this species of defence, it is proposed to direct the attention of the student to the various cases in which this mode of defence may, or may not, be made available.

General remarks as to its scope.

Rule 1. Where the person who sets up the plea has the legal estate, or the best right to call for the legal estate, a court of equity will grant no relief against him.

Where purchaser obtains

Nothing can be clearer than that a purchaser for valuable consideration, without notice of a prior equit-

the legal estate at the time of purchase.

able right, obtaining the legal estate at the time of his purchase, is entitled to priority in equity as well as at law, according to the well-known maxim, Where equities are equal, the law shall prevail.[1] Thus A., the owner of an estate, contracts with B. to sell it to him, and B. pays a part of the purchase money before the conveyance to him has been actually executed; in law, until the actual conveyance of the property to B., he has no title; whereas, in contemplation of equity, which looks on that as done which ought to have been done, B., from the moment of the contract, is the owner of the estate. If, then, A., after this contract of sale with B., makes an absolute conveyance of the legal estate to C., who purchases it for valuable consideration without notice of B.'s encumbrance; here C. has the legal estate in him, and having besides purchased *bonâ fide* for value without notice, C.'s equity to retain the estate is equal to B.'s right to enforce his equitable lien on it, the court of equity will refuse to give B. any relief as against C.

Where purchaser gets in the legal estate subsequently.

Not only is it clear that a purchaser for valuable consideration without notice of a prior equitable right, obtaining the legal estate at the time of his purchase, will be protected, but it has also been decided that such a purchaser who has not obtained the legal estate at the time, may protect himself by subsequently getting in the outstanding legal estate, so long as he does not by that act become a party to a breach of trust;[2] because, as the equities of both parties are equal, there is no reason why the purchaser should be deprived of the advantage he may obtain at law by superior activity or diligence.[3]

In *Phillips* v. *Phillips*,[4] the law on the point is thus laid down by Westbury, L. C.:—"It is well known that if there be three encumbrancers, and the third encum-

[1] 2 L. C. 5.
[2] *Saunders* v. *Dehew*, 2 Vern. 271.
[3] *Colcborn* v. *Alcock*, 2 Sim. 552.
[4] 10 W. R. 237.

brancer, at the time of his encumbrance and payment of his money, had no notice of the prior encumbrances, then if the first mortgagee or encumbrancer has the legal estate, and the third pays him off, and takes an assignment of his securities and a conveyance of the legal estate, he is entitled to tack his third mortgage to the first mortgage he has acquired, and to exclude the intermediate encumbrancer. But this doctrine is limited to the case where the first mortgagee has the legal title, for if the first mortgagee has not the legal title, the third mortgagee, by payment off of the first, acquires no priority over the second."

Where purchaser has the best right to call for the legal estate.

And not only where the purchaser has actually obtained, but where he has the *best right* to call for the legal estate, will he be entitled to the protection of equity. Thus, in *Wilmot* v. *Pike*,[1] a first mortgage of the X. estate was made to A. in fee. A second mortgage in 1826 was then made to B. of the same estate, together with the Y. estate, by a release and conveyance of the respective premises to C. as a trustee for B., with power of sale. B. afterwards, in 1835, advanced a further sum to the mortgagor on the security of the same estates X. and Y., but gave no notice of the advance to A. or C. Subsequently C., in 1840, after inquiry of A. whether he had notice of any encumbrance other than his own and that of which C. was trustee for B., advanced a further sum to the mortgagor on the same security, and gave notice of his mortgage to A. The question in the cause arose between the third and fourth mortgagees of 1835 and 1840 respectively, as to which was entitled to priority. It was held that, as to the X. estate, B. was entitled to priority over C. according to the maxim, *Qui prior est tempore, potior est jure;* for as regards that estate, B. and C. had only equitable interests, the legal estate outstanding in A., the first mortgagee. But with regard to the Y. estate, C., the fourth mortgagee,

[1] 5 Hare 14.

having the legal estate in him by virtue of his position as a trustee in the second mortgage of 1826, and also having advanced his money without notice of B.'s further advance in 1835, was entitled to priority over B. as to such further advance. "If a first encumbrancer has a declaration of trust only by the borrower, and none by the trustee, and the second encumbrancer has a formal mortgage of the equity of redemption, and the trustee is a party to the deed, and declares himself a trustee for the second encumbrancer, will not that declaration by the trustee give the second priority over the first? I think the second would in that case have a better right to call for the legal estate than the first; and if it would be so in the case of a stranger, I think the trustee cannot be precluded by his situation as trustee from claiming the benefit of the legal estate without notice. His case, however, might perhaps be supported on the simple ground that he had the legal estate, and advanced his money without notice, leaving every trust of which he had notice untouched by his present claim." Cases where questions arise between volunteers and subsequent purchasers for value may also be classed under this head.[1]

2. Plaintiff having the legal estate applies to the *auxiliary* jurisdiction of equity. The defence is good.

Rule 2. Where an application is made to the auxiliary jurisdiction of the court, as contradistinguished from its concurrent jurisdiction, by the possessor of a legal title, and the defendant pleads he is a *bonâ fide* purchaser for value without notice, the defence is good, and the court gives no aid to the legal title. This branch of the subject will be illustrated by the following cases:—

In *Basset* v. *Nosworthy*,[2] a bill was filed by an heir-at-law, claiming, under a legal title, against a person claiming as purchaser from the devisee under the will of his ancestor, to discover a revocation of the will. The defendant pleaded that he was a purchaser for valuable consideration, *bonâ fide*, without notice of any revocation, and the plea was allowed.

[1] *Buckle* v. *Mitchell*, 18 Ves. 100. [2] 2 L. C. 1.

Again, in *Walwyn* v. *Lee*,[1] a tenant in tail, in possession under a marriage settlement, filed a bill for discovery and delivery of title-deeds of an estate which had been mortgaged by his father, who was tenant for life under a settlement and a private Act of Parliament. The defendant pleaded that the plaintiff's father alleging himself to be seised in fee, and being in actual possession of the premises as apparent owner, and being also in possession of the title-deeds relating thereto, as apparent owner thereof, executed the several mortgages under which the defendant claimed, and averred that he had no notice. It was argued for the plaintiff, that as the defendant was neither in possession, nor had the means of procuring it, the court ought not to allow him to keep the deeds for the sole purpose of extortion. It was held, however, that the plea was a good defence. "This bill," said Lord Eldon, "is filed by a person having got possession. If the principle is that this court will not stir against a purchaser for valuable consideration without notice, what are the legal rights of the son, tenant in tail when his father's estate determines? His legal rights are that he shall have possession of the estate. I do not know that I am entitled to say of the title-deeds, but that he shall recover in trover the value of the deeds, or in detinue,[2] in which the judgment is for the deeds, or their value. But without attending to the imperfection of the law in such actions, which is probably the ground of jurisdiction here for the specific delivery of the thing, I will suppose his right at law to the specific delivery. It is true he is not seeking in equity to recover possession of the estate; but he is seeking to recover something which he cannot recover at law, the value of which *non constat* he can recover at law without the discovery of the deeds. Is it of necessity, then, that this court must hold, as against a purchaser for valuable consideration without notice, that if the possession of

[1] 9 Ves. 24.

[2] See. 17 & 18 Vict., c. 125, s. 78.

the estate has been got from him, the possession of the deeds shall be taken out of his hands by the court, and thrown in to the person who has got from him the possession of the estate? Is it not worth while consideration, whether the very principle of the plea is not this:—'I have honestly and *bonâ fide* paid for this, in order to make myself the owner of it, and you shall have no information from me as to the perfection or imperfection of my title, until you deliver me from the peril in which you state I have placed myself in the article of purchasing *bonâ fide*.'" The principle of the above decision was followed by Lord Chancellor Sugden in *Joyce* v. *De Moleyns*.[1] There the heir-at-law obtained possession of title-deeds relating to impropriate tithes, of which his second brother, under the will of their father, was tenant for life, and deposited them with bankers, by way of equitable mortgage, to secure a sum which they advanced to him. On a bill being filed by the administrator of a bond creditor of the father for the administration of his estate, praying that the bankers might be decreed to deliver up the deeds, the bankers insisted that they were purchasers for valuable consideration, without notice of the will or of the title of any persons claiming thereunder, or of the demands of the plaintiff, and submitted that the bill should either be dismissed, or that the plaintiff should redeem them. The Lord Chancellor dismissed the bill as against the bankers, with costs. "I apprehend that the defence of a purchase for value without notice, is a shield as well against a legal as an equitable title. That this is a good defence cannot be denied. Suppose a tenant for life under a will with remainder over; and that the tenant for life being heir-at-law of the testator, conveys the inheritance to a purchaser without notice, the remainder man cannot have any relief in equity against the purchaser. He must establish his title

[1] 2 J. & L. 374.

outside of this court as well as he can. It is the same with respect to title-deeds. The defendants, therefore, use the possession of the deeds as they have a right to do, as a shield to protect them against the plaintiffs. They can make no use of the deeds themselves; they cannot maintain possession of them against the true owner; but in this court they have a right to say that they ought not to be compelled to deliver them up, as they obtained them *bonâ fide* and without fraud." But, as already stated, it seems that this rule does not apply where the Court of Chancery, concurrently with courts of common law, affords legal as distinguished from equitable relief. The case of *Williams* v. *Lambe*[1] well illustrates this distinction. There a widow filed a bill against a purchaser from her husband, claiming her dower. The defendant pleaded that he was a purchaser of the estate for value, without notice of the vendor being married. Lord Thurlow, however, overruled the plea, observing that the only question was, whether a plea of purchase without notice would lie against a bill to set out dower; he thought where a party is pursuing a *legal title*, as dower is, that plea does not apply, it *being only a bar to an equitable not a legal claim.*[2]

Rule inapplicable where chancery has concurrent jurisdiction. As in bill for dower.

Rule 3. This rule is best stated in the words of Lord Westbury in *Phillips* v. *Phillips*:[3] "Now I take it to be a clear proposition that every conveyance of an equitable interest is an innocent conveyance; that is to say, the grant of a person entitled in equity passes only that which he is justly entitled to, and no more. If, therefore, a person seised of an equitable estate, the legal estate being outstanding, makes an assurance by way of mortgage, or grants an annuity and afterwards

3. The legal estate being outstanding, encumbrancers take in order of time.

[1] 3 Bro. C. C. 264.

[2] See also *Collins* v. *Archer*, 1 Russ. & My. 284; *Finch* v. *Shaw*, 19 Beav. 500; and Lord Westbury's remarks in *Phillips* v. *Phillips*, 8 Jur. N. S. 145, on this subject; *sed vide contra Sudg. Vrs. and Prs.* 797–8.

[3] 10 W. R. 236.

conveys the whole estate to a purchaser, he can only grant to the purchaser that which he has, namely, the estate, subject to the annuity or mortgage, and no more. The subsequent grantee takes only that which is left in the grantor. Hence grantees and encumbrancers claiming in equity take and are ranked according to the dates of their securities, and the maxim applies, *Qui prior est tempore, potior est jure.* The first grantee is *potior*, that is, *potentior.* He has a better and a superior, because a prior, equity. The first grantee has a right to be paid first; and it is quite immaterial whether the subsequent encumbrancers, at the time they took their securities and paid their money, had notice of the first encumbrance or not." Thus in *Ford* v. *White*,[1] property in Middlesex was mortgaged to A., and afterwards to B., and subsequently to C., with notice of B.'s encumbrance; C. registered his mortgage before B., and afterwards assigned to D., who had no notice of B.'s mortgage. Held by Sir J. Romilly, M. R., that as C.'s interest was equitable, he could not, by assigning it to D. without notice, put him in a better situation than himself, and consequently that D. was not entitled to priority over B.

Notice of first encumbrance immaterial.

4. Where plaintiff has a mere equity, the court will not interfere.

Rule 4. Where there are circumstances that give rise to an "equity," as distinguished from an "equitable estate;" for example, an equity to set aside a deed for fraud, or to correct it for mistake or accident, and the purchaser under the instrument maintains the plea of purchase for valuable consideration without notice, the court will not interfere. Thus, in *Sturge* v. *Starr*[2] a man, already married, performed the ceremony of marriage with a woman, and then joined with her in assigning her life interest in a trust-fund, to a purchaser. *Held*, that though she might not have executed such an instrument had she been aware of the fraud practised upon her, that fraud could not affect the rights

[1] 16 Beav. 120. [2] 2 My. & K. 195.

of a *bonâ fide* purchaser. So also equity will relieve a purchaser for valuable consideration against a defective execution of a power."[1]

The doctrine of notice.

The Doctrine of Notice.—No equitable doctrine is better established than that the person who purchases an estate, although for valuable consideration, after notice of a prior equitable right, makes himself a *malâ fide* purchaser, and will not be enabled, by getting in the legal estate, to defeat such prior equitable interest, but will be held a trustee for the benefit of the person whose right he sought to defeat.[2] Thus, in *Potter* v. *Sanders*,[3] it was held that if a vendor contract with two different persons for the sale to each of them of the same estate, and if the party with whom the second contract is made should, after notice of the first contract, procure a conveyance of the legal estate in pursuance of his second contract, the court will, in a suit for specific performance by the first vendee against the vender and second purchaser, decree the latter to convey the estate to the plaintiff. And to such an extent has the doctrine of notice been allowed to prevail, that it has even infringed upon the policy of the Registration Acts. Thus, in *Le Neve* v. *Le Neve*,[4] it was held that where lands in a register county, settled by deed which was not registered, were settled upon a second marriage, with notice of the former settlement; and the second settlement was registered pursuant to the statute, the former settlement should be preferred in equity. "This is a species of fraud and *dolus malus* itself; for he knew the first purchaser had the clear right of the estate, and after knowing that, he takes away the right of another person, by getting the legal estate."

Purchaser with notice of prior claim, a trustee to the extent of such claim.

It has long been settled that if a person purchases

[1] *Chapman* v. *Gibson*, 3 Bro C. C. 229; *Maldin* v. *Menill*, 2 Atk. 8.

[2] 2 L. C. 39.

[3] 6 Hare 1.

[4] 2 L. C. 28.

Secus-subpurchaser with notice, if his vendor bought without notice. Or subpurchaser without notice, though his vendor, bought with notice.

for valuable consideration with notice, from a person who bought without notice, he may shelter himself under the first purchaser, for otherwise a *bonâ fide* purchaser would be unable to deal with his property, and the sale of estates would be very much clogged; and if a person who buys with notice sells to a *bonâ fide* purchaser for valuable consideration without notice, the latter may protect his title.[1] In *Harrison* v. *Forth*,[2] A. purchased an estate with notice of an encumbrance, and then sold it to B., who had no notice, who afterwards sold it to C., who had notice. Held, that though A. and C. had notice, yet if B. had no notice the plaintiff could not be relieved against the defendant C. In this and similar cases, it is perhaps to be assumed that the estate which A. had, which was successively assigned to B. and C., was the legal estate. Had the estates been equitable, as will have been seen from the third rule, A., having had notice of a prior encumbrance, could not, by concealing his knowledge from B., make B.'s security more extensive than his own, or give a better right to his assignee than that which he himself possessed.

Notice of voluntary settlement does not affect subsequent purchaser.

A purchaser for valuable consideration of an estate, even with notice of a voluntary settlement, will not be affected by it, even though such voluntary settlement be free from fraud, and meritorious as a provision for relations.[3]

What constitutes notice.

What constitutes Notice.—Notice is either actual or constructive, but there is no difference between them in their consequences.[4]

Actual notice.

1. As to actual notice it will suffice to say, that to constitute a binding notice it must be given by a person interested in the property, and in the course of the treaty for the purchase.[5] Vague reports from persons

[1] 2 L. C. 42.
[2] Prec. Ch. 51.
[3] *Buckle* v. *Mitchell*, 18 Ves. 100.
[4] *Prosser* v. *Rice*, 28 Beav. 68.
[5] *Barnhart* v. *Greenshields*, 9 Moo. P. C. 18.

not interested in the property will not affect the purchaser's conscience, nor will he be bound by notice in a previous transaction which he had forgotten. And not only a mere assertion that some other persons claim a title is not sufficient, but a general claim is perhaps not sufficient to affect a purchaser with notice of a deed.[1]

Constructive notice.

2. Constructive notice in its nature is no more than evidence of notice, the presumption of which is so violent, that the court will not even allow of its being controverted.[2]

What amounts to constructive notice depends on the circumstances of the case. *Jones* v. *Smith*.

It is by no means an easy matter to say what amounts to constructive notice; for much depends upon the circumstances of each peculiar case. In the case of *Jones* v. *Smith*,[3] Wigram, V. C., states the law on the subject with great clearness. The facts of the case were as follows:—A party before advancing money on a mortgage, inquired of the intending mortgagor and his wife whether any settlement had been made upon their marriage, and was informed that a settlement had been made of the wife's fortune only, and that it did not include the husband's estate, which was proposed as the security. He then advanced the mortgage money, without having seen the settlement, or knowing its contents. Held that the mortgagee was not, under the circumstances, affected with constructive notice of the contents of the settlement, or of the fact that the settlement comprised the husband's estate. "It is scarcely possible to declare *a priori* what shall be deemed constructive notice, because unquestionably that which would not affect one man may be abundantly sufficient to affect another. But I believe I may, with sufficient accuracy for my present purpose, assert that the cases in which constructive notice has been established resolve themselves into two classes. First, cases in which

Constructive notice of two kinds.

[1] Sugd. Vrs. & Prs. 755.
[2] *Plumb* v. *Fluitt*, 2 Anst. 438; *Henderson* v. *Greaves*, 2 E. & A. 9.
[3] 1 Hare, 55.

1. Where actual notice of a fact, which would have led to notice of other facts.

the party charged has had actual notice that the property in dispute was in fact charged, encumbered, or in some way affected, and the court has thereupon bound him with constructive notice of facts and instruments to a knowledge of which he would have been led by an inquiry after the charge, encumbrance, or other circumstance affecting the property, of which he had actual notice; and, secondly, cases in which the court has been satisfied, from the evidence before it, that the party charged had designedly abstained from inquiring, for the very purpose of avoiding notice—a purpose which, if proved, would clearly show that he had a suspicion of the truth, and a fraudulent determination not to learn it. If, in short, there is not actual notice that the property is in some way affected, and no fraudulent turning away from a knowledge of facts, which the *res gestæ* would suggest to a prudent mind, if mere want of caution, as distinguished from fraudulent and wilful blindness is all that can be imputed to the purchaser, there the doctrine of constructive notice will not apply; there the purchaser will, in equity, be considered, as in fact he is, a *bonâ fide* purchaser without notice." As an illustration of the first part of the rule, may be cited the case of *Bisco* v. *Earl of Banbury*.[1] A party purchased with actual notice of a specific mortgage; the deed creating the mortgage referred to other encumbrances. *Held*, that the purchaser, knowing of the mortgage, ought to have inspected the deed, and that would have led him to the other deeds, on which, pursued from one to another, the whole case must have been discovered to him.[2] As an illustration of the second part of the rule, the case of *Birch* v. *Ellames*[3] is directly in point. There the title deeds of an estate were deposited with the plaintiff as a security for his demand. The defendant, fourteen years after, upon the eve of the bankruptcy of the mortgagor, took a mort-

2. Where inquiry purposely avoided to escape notice.

Mere want of caution not constructive notice.

[1] 1 Ch. Ca. 287.
[2] *Ware* v. *Egmont*, 4 De G., M & G., 473.
[3] 2 Anstr. 427.

gage antedated; he had notice of the deposit, but avoided inquiring the purpose for which it was made. The court decreed for the plaintiff.[1] But the mere absence of title-deeds has never been held sufficient *per se* to affect a party with notice, if he has *bonâ fide* inquired for the deeds, and a reasonable excuse has been given for the non-delivery of them; for in that case the court cannot impute fraud or gross and wilful negligence to him.[2] But the court will impute fraud or gross and wilful negligence to a person dealing respecting an estate, if he omits all inquiries as to deeds.[3]

Inquiry after title-deeds must be made.

It is clear that notice to an agent, attorney, or counsel for the purchaser, is constructive notice to his principal. And the same rule applies if the same agent be concerned for both vendor and purchaser, in the same transaction, even if the agent himself be the vendor.[4] However, notice to counsel, agents, or solicitors must, in order to affect their employers, have been given or imparted to them in the same transaction; for, if the law were otherwise, it would make purchasers' and mortgagees' titles depend on the memory of their counsel or agents. Where, however, one transaction is closely followed by and connected with another, or where it is clear that a previous transaction is present to the mind of the solicitor when engaged in another transaction, there is no ground for the distinction by which the rule, that notice to the solicitor is notice to the client, has been restricted, to the same transaction. This subject was fully considered by Wigram, V.C., in the important case of *Fuller* v. *Bennet*.[5] There, after the commencement of a treaty for the sale of an estate by A., and the purchase of it by B., A. agreed to give C. a mort-

Notice to agent, &c., notice to principal.

Notice must have been in same transaction.

[1] *Whitbread* v. *Jordan*, 1 Y. & C., Ex. Ca. 303.

[2] *Allen* v. *Knight*, 5 Hare 272; *Hewitt* v. *Loosemore*, 9 Hare 449.

[3] *Worthington* v. *Morgan*, 16 Sim. 547.

[4] *Le Neve* v. *Le Neve*, 2 L. C. 28; *Spencer* v. *Topham*, 2 Jur. N. S. 865.

[5] 2 Hare 394.

gage on the estate, as a security for an antecedent debt, and notice of the agreement was given to the solicitors of B. The treaty for the sale afterwards ceased to be prosecuted for five years, during part of which time the suit of an adverse claimant to the estate was pending. A. then died, and B. purchased the estate at a lower price from the heir and devisee of A. B. conveyed the estate in mortgage to D. The same solicitors were concerned for B., from the commencement of the treaty with A. until the final purchase of the estate, and for D. in the business of the mortgage. It was held, under the circumstances of the case, that B. and D. had, through their solicitors, constructive notice of the agreement with C., and that the estate in their hands was subject to the lien of C. for the amount agreed to be secured by the proposed mortgage. In the judgment his lordship thus succinctly lays down the general rules: "The general propositions,—first, that notice to the solicitor is notice to the client; secondly, that where a purchaser employs the same solicitor as the vendor, he is affected with notice of whatever that solicitor had notice in his capacity of solicitor for either vendor or purchaser, in the transaction in which he is so employed; and thirdly, that the notice to the solicitor, which will alone bind the client, must be notice in that transaction in which the client employs him,—have not, as general propositions, been disputed at the bar." Finally, in order to affect a person with a constructive notice of facts within the knowledge of a solicitor, it is necessary not only that the knowledge should be derived from the same transaction, but it must be material to that transaction, and such that it was the duty of the agent to communicate. See *Wyllie* v. *Pollen*,[1] where it was held by Lord Westbury, C., that the transferee of a mortgage would not be affected by the knowledge of the solicitor acting for him in the transfer of an encumbrance subsequent to the original mortgage, so as to

[1] 32 L. J. (Ch.) N. S. 782.

prevent him making further advances, such knowledge not being material to the business of the transfer.

5. He who seeks equity must do equity.

6. He who comes into equity must come with clean hands.

7. Equity aids the vigilant, not the indolent.

These three maxims may be viewed as together illustrating the great distinctive and governing principle of equity, that nothing can call forth a court of equity into activity but conscience, good faith, and personal diligence.

He who seeks equity must do equity.

As an illustration of the maxim, "He who seeks equity must do equity," may be briefly noticed the rules which govern what is termed a married woman's "equity to a settlement." The general rule is that when a *feme sole* marries, her property, subject to certain conditions, passes to her husband; all her choses in action which the husband can reduce into possession, without the aid of a court of equity, he may realise; but the moment he is obliged to ask the assistance of equity for that purpose, the court will only aid him on conditions. If, for instance, a testator bequeaths a legacy to a married woman, her husband can only realise the legacy through a court of equity. The moment the husband comes into court to claim it, the court will tell him, "We will help you to get all the money, only on condition that you make a fair settlement out of it for the benefit of your wife and children."[1]

Married woman's equity to a settlement.

Person standing by must give compensation.

Another class of cases may be noticed as further illustrating how beneficial is the interference of equity

[1] *Sturgis* v. *Champneys*, 5 My. & Cr. 105.

in carrying out the principle of these maxims. For instance, if a person having a title to an estate stands by and suffers a person ignorant of it to expend money upon the estate, either in buildings or other improvements, and afterwards asserts his title in a court of law, upon proving his title, judgment would be given for him without any compensation for improvement being given to the person evicted. In equity, however, a person who had expended money under such circumstances on the estate of another, would be entitled to be indemnified for his expenditure, either by pecuniary compensation, or, in some cases, if he were a lessee under a defective lease, by a confirmation of his title.[1]

Compensation in cases of specific performance.

This maxim is also frequently illustrated in that class of cases where, in consequence of some misdescription in the property sold, a court of equity will not enforce specific performance of the contract at the suit of the vendor, unless he makes compensation for the injury the defendant has sustained from the misdescription.[2]

He who comes into equity must come with clean hands.

He who comes into equity must come with clean hands. In *Overton* v. *Banister*,[3] this maxim received a pointed illustration. An infant, fraudulently concealing his age, obtained from trustees part of stock to which he was entitled on coming of age; and when of age, a few months after, applied for, and received the residue of such stock. It was held a fraud on the part of the infant, and neither himself nor his assignees were allowed to enforce repayment by the trustees of the stock paid during the minority.[4]

[1] *Ramsden* v. *Dyson*, L. R. 1 H. L. 129; *Powell* v. *Thomas*, 6 Ha 300.

[2] *Knatchbull* v. *Greuber*, 1 Mad. 153; *Hughes* v. *Jones*, 3 De G., F. & J. 307.

[3] 3 Hare, 503.

[4] *Savage* v. *Foster*, 9 Mod. 35; *Nelson* v. *Stocker*, 4 De G. & Jo. 458, 464.

The rule must be understood to refer to wilful misconduct in regard to the matter in litigation, and not to any misconduct, however gross, which is unconnected with the matter in litigation, and with which the opposite party in the cause has no concern.[1]

Vigilantibus non dormientibus, æquitas subvenit.

Finally, the doctrine that equity aids the vigilant, not the indolent, may be briefly summed in the language of Lord Camden in *Smith* v. *Clay*,[2] "a court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands where the party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence."[3]

8. Equality is equity.

8. *Equality is Equity*, or equity delighteth in equality. This maxim has a very large application in many branches of equity; but it is perhaps nowhere so clearly illustrated as in the case of joint purchases. If two persons advance and pay the purchase-money of an estate in equal portions, and take a conveyance to them and their heirs, it constitutes a joint tenancy, that is, a purchase by them jointly of the chance of survivorship: and, of course, on the death of one, the survivor will take the whole estate. This is the rule at law, and it prevails also in equity under the same circumstances; for unless there are controlling circumstances, equity follows the law. But wherever such circumstances occur, courts of equity will lay hold of them to prevent a survivorship, and create a trust; for joint tenancy is not favoured in equity. Thus, in *Lake* v. *Gibson*[1] it was laid down, that where two or more purchase lands, and advance the purchase-money in *unequal* shares, and this appears on the deed itself,

Equity leans against joint-tenancy.

Money advanced in unequal shares.

[1] Sm. M. 23.
[2] 3 Bro. C. C., 638.
[3] *Wright* v. *Vanderplank*, 2 K. & J. 1, 8 De G., M. & G. 133; *Laver* v. *Fielder*, 32 Beav. 1; *Strange* v. *Fooks*, 4 Giff. 408.
[4] 1 L. C. 160.

this makes them in the nature of *partners;* and however the legal estate may survive, yet the survivor will in equity be considered as a trustee for the other, in proportion to the sum advanced by him. "Where the parties advance the money equally, it may fairly be presumed that they purchased with a view to the benefit of survivorship; but where the money is advanced in unequal proportions, and no express intention appears, to benefit the one advancing the smaller proportion, it is fair to presume that no such intention existed."[1] So again, if two persons advance a sum of money, in equal or unequal shares, by way of mortgage, and take the mortgage to them jointly, and one of them dies, the survivor shall not have the whole money due on the mortgage; but the representative of the deceased party shall have his proportion as a trust; for the nature of the transaction as a loan of money, repels the presumption of an intention to hold the mortgage as a joint tenancy.[2]

Money advanced on mortgage.

9. Equity looks to the intent rather than the form.

9. Equity looks to the intent rather than the form. Although this principle is fully recognised in the common law, it is to equity that we look for its complete and practical exemplification. Equity will never permit the thin veil of mere form to hide the true bearings of a transaction. Thus it is a well-known rule that equity will relieve against a penalty or forfeiture; if, therefore, it is satisfied that a condition in a bond to pay a sum of money is penal, it will refuse to give effect to that condition, even though the parties may state in the bond in express words, that the condition is not by way of penalty, but is to be held as the ascertained or "liquidated damages" for breach of the covenant. To this maxim may be referred the equitable doctrines that govern mortgages, penalties, and forfeitures,—and nowhere, perhaps, more than in

Relief against penalties and forfeitures.

[1] Sugd., V. & P. 697, 1 L. C. 168.

[2] *Rigden* v. *Vallier*, 2 Ves. Sr. 258; *Morley* v. *Bird*, 3 Ves. 631.

these is the divergence of equity from common law so strongly and clearly exhibited.[1]

10. Equity looks on that as done which ought to have been done. The true meaning of this maxim is, that equity will treat the subject-matter of a contract, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been, not as they might have been executed. But equity will not thus consider things in favour of all persons, but only in favour of such as have a right to pray that the acts might be done. The most frequent cases of the application of the rule are under agreements. All agreements are considered as performed, which are made for a valuable consideration, in favour of persons entitled to assist in the performance. They are to be considered as done at the time when, according to the tenor thereof, they ought to have been performed. They are also deemed to have the same consequences attached to them; so that one party or his privies shall not derive benefit by his laches or neglect; and the other party, for whose profit the contract was designed, or his privies, shall not suffer thereby. Thus, money covenanted or devised to be laid out in land, is treated as real estate in equity, and descends to the heir. And, on the other hand, where land is contracted or devised to be sold, it is considered and treated as money.[2] This maxim will be fully exemplified under the head of equitable conversion.

10. Equity looks on that as done which ought to have been done.

Equitable conversion.

11. Equity imputes an intention to fulfil an obligation. Where a man is bound to do an act, and he does one which is capable of being considered as done in fulfilment of his obligation, it shall be so construed,

11. Equity imputes an intention to fulfil an obligation.

[1] *Peachy* v. *Duke of Somerset*, 2 L. C. 979.

[2] St. 64, (*g.*)

because it is right to put the most favourable construction on the acts of others, and to presume that a man intends to be just before he is generous.[1] Thus on marriage, the husband covenants to pay to trustees the sum of £2000, at least, to be laid out in land in the county of D., and settled to the uses of the marriage; the husband never pays the money to the trustees, but soon after marriage purchases land in the same county, and takes the conveyance to himself in fee, and then dies intestate, without making any settlement. These lands will be considered as purchased by the husband in pursuance of his covenant, and be liable to the trusts of the settlement.[2] Under this maxim will be ranked the doctrines of satisfaction and performance.

[1] 2 Sp. 204. [2] *Sowden* v. *Sowden*, 1 Bro. C. C. 582.

PART II.

EXCLUSIVE JURISDICTION.

CHAPTER I.

TRUSTS GENERALLY.

Feoffment, with livery of seisin.

PREVIOUSLY to the reign of Henry VIII., when the Statute of Uses was passed, a simple gift of lands to a person and his heirs, accompanied by livery of seisin, was all that was necessary to convey to that person an estate in fee simple in the lands. The courts of law did not deem any consideration necessary; but if a man voluntarily gave lands to another, and put him in possession of them, they held the gift to be complete and irrevocable—just as a gift of money or goods, made without any consideration, is, and has ever been, quite beyond the power of the giver to retract, if accompanied by delivery of possession. In law, therefore, the person to whom a gift of lands was made, and seisin delivered, was considered thenceforth to be the true owner of the lands.[1] About the close of the reign of Edward III., a new species of estate unknown to the common law sprung into existence. The Statutes of Mortmain had prohibited lands from being given for religious purposes. In order to evade the stringency of these statutes, the ecclesiastics hit upon the device of obtaining grants to persons *to the use* of the religious houses.[2] In process of time such feoffments to one person to the use of another became very

Uses arise temp. Edw. III.

An invention of the ecclesiastics.

[1] William's Real Property, 151.

[2] 2 Bl. Com. 328.

common; and, "under the auspices of an ecclesiastical chancellor, though alien to the soil, took root in our civil jurisprudence, and attained to a degree of influence and importance which at length almost superseded the ancient polity."[1] In law, the person to whom a gift of lands was made and seisin delivered, was considered thenceforth to be the true owner of the land. In equity, however, this was not always the case; for the Chancellor, in the exercise of his jurisdiction over the conscience, held that the mere delivery of the possession or seisin by one person to another was not at all conclusive of the right of the feoffee to enjoy the lands of which he was enfeoffed. Equity was unable to take from him the title which he possessed, and could always assert in the courts of law; but equity could and did compel him to make use of that legal title for the benefit of any other person who might have a more righteous claim to the beneficial enjoyment. Thus A. conveyed land to B. to his (A.'s) own use, or to the use of C. This declaration of the use charged the *conscience* of B., the legal feoffee or grantee, but did not attach itself to the *land*. If, therefore, B. refused to account to his *cestui que use* (*i.e.*, he to whose use the property was conveyed [A. or C.]) for the profits, or wrongfully conveyed the estate to another, this was merely a breach of confidence on the part of B., for which the common law gave no redress; much less did that law recognise any right in A. or C. to the possession or enjoyment of the land. The ordinary judicature knew no other proprietor than B. To him, and to him alone, attached the privileges and liabilities of a landholder; for *he* it was to whom the possession was legally delivered. It was accordingly decided, at a very early period,[2] that the common law judges had no jurisdiction whatever in regard to the use. But means were soon devised for compelling B., the owner in point

Chancellor's jurisdiction over the conscience.

Cestui que use.

Uses not recognised at common law.

[1] Hayes' Intro. 33.

[2] 4 Edw. IV.

of law, to keep good faith towards A. or C., the owner in point of conscience. The king, in his Court of Chancery, assumed a jurisdiction to extort a disclosure upon oath of the nature and extent of the confidence reposed in B., and to enforce a strict discharge of the duties of his trust. Hence equity arose. From this period, when the right of A. or C. became cognisable in a Court of Chancery, we may speak of him as the equitable or beneficial owner, and of B. as the legal owner. But in order to preserve a clear perception of the twofold character of the system, we must keep steadily in view the fact, that B. had still the *real* right to be enforced on one side of Westminster Hall, by judgment of law *in rem*, which went at once to the possession of the land itself; while A. or C. had nothing more than a right *in personam*, to be enforced on the other side of the Hall, by writ directed against the individual trustee. The Chancery, in assuming jurisdiction over the use, left untouched and unviolate the ownership at the common law. It exercised no direct control over the land, but only coerced and imprisoned the person of the legal owner who obstinately resisted its authority. It will be seen, therefore, that, "by the introduction of uses, as well the cardinal maxims of the feudal policy, as many of the subordinate rules of property, were virtually defeated. The clergy, who were prohibited by law from purchasing land, but who could now take the profits to any extent without becoming the legal owners of a single rood, increased their possessions. The factious baron vested his estate in a few confidential friends, and committed treason with comparative safety. The peaceful proprietor, adopting the same precaution, enjoyed and disposed of the beneficial interest, unvexed by the exactions of the lord, and regardless of the rules of the common law."[1] Among the benefits conferred by uses upon the landowner, the power of disposition by will,

Equity acts *in personam*.

Uses opposed to feudal policy.

Uses devisible.

[1] Hayes' Intro. 34, 35.

a power which seems necessary to complete the idea of property, was one of the most valuable and important. The land itself was not yet devisable, but the legal owner was bound in equity to observe the testamentary destination of the person to whom the use or beneficial right belonged.[1]

Land not devisable till 32 Hen. VIII. c. 1.

Statute of Uses, 27 Hen. VIII. c. 10.

The inroads which uses had made, and were still making, on the ancient law of tenure, at length induced the legislature to pass the famous Statute of Uses.[2] By this statute it was enacted, that where any person or persons shall stand seised of any lands or other hereditaments to the use, confidence, or trust of any other person or persons, the persons that *have* any such use, confidence, or trust (by which was meant the person beneficially entitled), shall be deemed in lawful seisin and possession of the same lands and hereditaments for such estates as they have in the use, trust, or confidence. The result of this enactment will be best seen in one or two examples. Suppose a feoffment be now made to A. and his heirs, and the seisin duly delivered to him. If the feoffment be expressed to be made to him and his heirs, to the use of B. and his heirs, A., who would before the statute have had an estate in fee-simple at law, now takes no permanent estate, but is made by the statute to be merely a kind of conduit pipe for conveying the estate to B. For B., who before would have had only a use or trust in equity, shall now, having the use, be deemed in lawful seisin and possession—in other words, B. now takes not only the beneficial interest, but also the estate in fee-simple at law, which is wrested from A. by force of the statute. Again, suppose a feoffment to be made simply to A. and his heirs without any consideration. Before the statute the feoffor would, in this case, have been held in equity to have the use, for want of any consideration to pass it to the feoffee; now, therefore, the feoffor having the use, shall be deemed in law-

Resulting use.

[1] Hayes' Intro. 36.

[2] 27 Hen. VIII. c. 10.

ful seisin and possession; and, consequently, by such a feoffment, although livery of seisin be duly made to A., yet no permanent estate will pass to him; for the moment he obtains the estate, he holds it to the use of the feoffor, and the same instant comes the statute and gives to the feoffor, who has the use, the seisin, and possession. The feoffor, therefore, instantly gets back all that he gave, and the use is said to *result* to himself.[1] Although the object of this enactment was completely to extirpate the doctrine of trust, we shall see that the statute, so far from effecting this object, rather gave a fresh stimulus to the system it was intended to destroy. The statute aimed at rendering uses innoxious, by turning the use into a legal estate; the confidence in the person into a direct right to the land. It annexed to the use the actual possession of the subject; not prohibiting or restricting the creation of uses, but only operating upon the use when created. Now the common law judges thought fit to determine that, if A., the legal owner of the land, was directed to hold the land to the use of B., who was directed to hold it to the use of C., the statute would carry the land to B. at law, but carry it no further, however plainly the intention might appear that the use or benefit was really designed for C., who was therefore left to enforce his right to a conveyance by a suit in equity against B. The ultimate use in favour of C. was said to be a use upon a use, which the statute, having exhausted itself in the act of communicating the properties of a legal estate to the use in favour of B., had not remaining energy to reach.[2] Hence the line of demarcation between the legal and equitable ownership was drawn as broadly and strongly as ever. In order to create, after the passing of the statute, an interest purely equitable, nothing more was necessary than to declare a second use. Suppose, for

No use upon a use at law.

[1] 1 Sand. Us. 99, 100.
[2] *Lloyd* v. *Passingham*, 6 B. & C. 305; Hayes' Intro. 53.

example, that A. sold land to B., who desired to have the legal estate vested in his confidential friend C., the object was affected by A.'s conveying land to C. to the use of C., to the use of, or, as we should now express it, in trust for B. Here the land passes by the conveyance to C., under the old law; and the use being also declared in favour of C., the common law, in the spirit of the above exposition, declined to transfer the possession from C. to B. The substantial use thus arbitrarily excluded from the pale of the law was once more received into the bosom of equity. There B. was acknowledged as the beneficial owner.[1]

Hence the equitable jurisdiction.

Equitable estates.

We have now arrived at a very prevalent and important kind of interest, namely, an estate in equity merely, and not at law. The owner of such an estate has no title at all in any court of law, but must have recourse exclusively to the Court of Chancery, where he will find himself considered as owner, according to the equitable estate he may have. The modern doctrines of Chancery, however, with regard to the question, What is a sufficient consideration? differ materially from those held in earlier times. Thus it was a rule that a consideration, however trifling, given by the feoffee, was sufficient to entitle him absolutely to the lands of which he was enfeoffed.[2] But the absence of such consideration caused the use or beneficial ownership to result or revert to the feoffor. But the Court of Chancery at present takes a wider scope, and will not grant or withhold its aid according to the payment or non-payment of five shillings; thus circumstances of fraud, mistake, or the like, may induce the Court of Chancery to order the grantee, under a voluntary conveyance, to hold merely as a trustee for the grantor: but the mere want or inadequacy of valuable consideration would not now be deemed by that court a sufficient cause for

[1] Hayes' Intro. 53. [2] 1 Sand. Us. 59, 62.

its interference.[1] The word *trust* is never employed in modern conveyancing, when it is intended to vest an estate in fee simple in any person by force of the Statute of Uses. Such an intention is always carried into effect by the employment of the word *use;* and the word *trust* is reserved to signify a holding by one person for the benefit of another, similar to that which before the statute was called a use.[2]

Equity follows the analogy of the law.

In the construction and regulation of trusts, equity is said to follow the law; that is, the Court of Chancery generally adopts the rules of law applicable to legal estates; thus a trust for A. for his life, or for A. and the heirs of his body, or for A. and his heirs, will give A. respectively an equitable estate for life, an estate in tail, or an estate in fee-simple. Again, an equitable estate in fee-simple immediately belongs to every purchaser of freehold property the moment he has signed a contract for its purchase, provided the vendor has a good title. If, therefore, the purchaser were to die intestate, the moment after the contract is completed, the equitable estate in fee-simple which he had just acquired would descend to his heir-at-law, and the vendor would be a trustee for such heir, until he should have made a conveyance of the legal estate to the heir.[3]

Not only did the rule, that the common law could not recognise a use upon a use, very much limit the application of the statute, but it will also be observed that the Statute of Uses was pointed at the extirpation of uses of lands, tenements, and hereditaments, and therefore many other species of property were left untouched by it.

1. As to leaseholds, and personal chattels, they were

[1] *Coles* v. *Trecothick*, 9 Ves. 246. Us. 278.
[2] Wms. R. Prop. 155 ; 1 Sand. [3] See Wms. R. Prop. 159, 160.

Property to which the Statute of Uses is inapplicable.

held to be excluded by the letter of the statute. If land was vested in A. for a term of years to the use of B., the statute was held not to transfer the legal interest in the term to B. Hence the term of years remained in A. at law, and B.'s use underwent no change except a change of name, for it was now called in conformity with the style adopted in regard to freehold interests, a *trust*.[1]

2. As to freeholds even, only uses of a certain description were operated on by the statute. The only uses to which the statute applied were passive uses, and resulting uses. But in regard to active and constructive uses, when the use involved a direction to sell, and divide the money, or to pay debts, &c., the statute was necessarily inoperative.[2]

3. The statute was inapplicable to copyhold estates.[3]

With regard to trusts of all these classes of property, therefore, the rules applied after the statute were the same that they were subject to before the Statute of Uses.

Trusts originally created by parol.

Before the Statute of Frauds, trusts of every species of property might have been created or passed from one person to another without any writing, and without the use of any particular form of words. But in consequence of the danger of permitting the often complicated directions of a trust todepend upon so uncertain a thing as memory, the Legislature early enacted that certain species of trusts should be in writing. By the Statute of Frauds[4] it was enacted:—

Statute of Frauds.

Sec. 7. That all declarations or creations of trusts or confidences, of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trusts, or by his last will in writing.

[1] Gilb. Us. 79.
[2] Hayes' Intro. 51.
[3] 2 Ves. Sr. 257; 1 Sand. Us. 249.
[4] 29 Car. II. c. 3.

Sec. 9. That all grants and assignments of any trust or confidence shall likewise be in writing signed by the party granting or assigning the same, or by his last will.

Sec. 8 recognises two exceptions from the statute :— Exceptions.

(*a.*) Trusts arising or resulting from any conveyance of lands or tenements, by implication or construction of law.

(*b.*) Trusts transferred or extinguished by an act or operation of law.

Of the interests within the act :— Interests within the act.

1. Trusts of copyholds cannot be declared by parol.[1]
2. Trusts of chattels real must be evidenced by writing.[2]
3. But chattels personal are not within the act.[3]

A trust, as will be seen from the instances above given, is a beneficial interest in, or a beneficial ownership of, real or personal property unattended with the possessory or legal ownership thereof.[4] Definition of Trust.

Trusts may be classified under three heads: *express trusts*, *implied trusts*, and *constructive trusts*. Those falling under the first head may be again subdivided according to their end and purpose into *express private trusts*, and *express public or charitable trusts*. Trusts implied and constructive are frequently confounded, or at least classed together, and it is difficult to draw a satisfactory line between them. It is proposed in the succeeding chapters to treat of each in its turn. Classification —express, implied, and constructive.

[1] Lewin Tr. 43; *Withers* v. *Withers*, Amb. 151.
[2] *Forster* v. *Hale* 3 Ves. 696; *Riddle* v. *Emerson*, 1 Vern. 108.
[3] *M'Fadden* v. *Jenkins*, 1 Ph. 157; *Benbow* v. *Townsend*, 1 My. & K. 506.
[4] 2 Sp. 875.

CHAPTER II.

EXPRESS PRIVATE TRUSTS.

Express trust.

Executed, or executory.

AN express trust is a trust which is clearly expressed by the author thereof, whether verbally or by writing, and may be either executed, or executory in the sense of directory. A trust is said to be executed when no act is necessary to be done to give effect to it, the trust being finally declared by the instrument creating it, as where an estate is conveyed to A. in trust for B.

A mere direction, however, to convey upon certain trusts, will not render trusts executory in the sense of directory. "All trusts," observes Lord St Leonards, "are in a sense executory, because a trust cannot be executed except by conveyance, and therefore there is something always to be done. But that is not the sense which a court of equity puts upon the term 'executory trust.' A court of equity considers an executory trust as distinguished from a trust executing itself, and distinguishes the two in this manner—Has the testator been what is called, and very properly called, his own conveyancer? Has he left it to the court to make out from *general expressions* what his intention is, or has he so defined that intention that you have nothing to do but to take the limitations he has given to you, and to convert them into legal estates?"[1]

As to trusts executed equity follows the law.

In the case of trusts executed a court of equity will put the same construction on technical words as is put by a court of law on limitations of legal estates. If,

[1] *Egerton* v. *Brownlow*, 4 H. L. Ca. 210.

for instance, an estate is vested in trustees and their heirs in trust for A. for life, without impeachment of waste, with remainder to trustees to preserve contingent remainders, with remainder in trust for the heirs of A.'s body, the trust being an executed trust, A., according to the rule in *Shelley's case*, which is a rule of law, will be held to take an estate tail.[1]

Executory or directory.

A trust executory or directory is a trust raised either by stipulation or direction in express terms, or by necessary implication, to make a settlement or assurance to uses or upon trusts which are indicated in, but do not appear to be finally declared by, the instrument containing such stipulation or direction, as in the case of marriage articles, and as in the case of a will where property is vested in trustees to *settle* or convey in a more perfect and accurate manner, in both which cases a further act—viz., a settlement or a conveyance, is contemplated.

Construed according to settlor's intention.

In cases, therefore, of executory trusts, where something is left to be done—where the trusts remain to be executed in a more careful and accurate manner—a court of equity will not construe the technical expressions in the document declaring the trust with legal strictness, but will mould the trusts according to the intention of the creator of the trusts, if such intention can be ascertained. If no such intention can be collected, whether from the instrument itself or from the nature of the case, the court is bound to construe the technical terms used in the instrument according to their strict legal meaning.[2]

In marriage articles.

It is from this circumstance that marriage articles, which are in the nature of executory trusts, are construed differently from executory trusts in wills; the

[1] *Jervoise* v. *D. of Northumberland*, 1 J. & W. 559.

[2] *Glenorchy* v. *Bosville*, 1 L. C. 1.

object and purpose of the former furnish an indication of intention which must be wanting in the latter. When the object is to make a provision, by the settlement of an estate for the issue of the marriage, it is not to be presumed that the parties meant to put it in the power of the father to defeat that purpose and appropriate the estate to himself. If, therefore, the agreement is to limit an estate for life, with remainder to the heirs of the body, the court decrees a strict settlement in conformity to the presumable intention; but if a will directs a limitation for life, with remainder to the heirs of the body, the court has no such ground for decreeing a strict settlement. A testator gives arbitrarily what estate he thinks fit; there is no presumption that he means one quantity of interest rather than another—an estate for life rather than in tail or in fee. The subject being mere bounty, the intended extent of that bounty can be known only from the words in which it is given; but if it is clearly to be ascertained from anything in the will that the testator did not mean to use the expressions which he has employed in their strict, proper, technical sense, the court, in decreeing such settlement as he has directed, will depart from his words in order to execute his intention.[1]

In wills.

Executory trusts under marriage articles.

As to executory trusts under marriage articles—

If in articles before marriage for making a settlement of the real estate of either the intended husband or wife, it is agreed that the same shall be settled upon the heirs of the body of them, or either of them, in such terms as would, if construed with legal strictness, according to the rule in *Shelley's case*, give either of them an estate tail, and enable either of them to defeat the provision for their issue, courts of equity considering the object of the articles, viz., to make pro-

[1] *Blackburn* v. *Stables*, 2 V. & B. 369; *Deerhurst* v. *Albans*, 5 Mad. 260.

vision for the issue of the marriage, will, in conformity with the presumed intention of the parties, decree a settlement to be made upon the husband or wife for life only, with remainder to the issue of the marriage, in tail as purchasers. Thus, in *Trevor* v. *Trevor*,[1] A., in consideration of an intended marriage, covenanted with trustees to settle an estate to the use of himself for life, without impeachment of waste, remainder to his intended wife for life, remainder to the use of the heirs male of him on her body begotten, and the heirs male of such heirs male issuing, remainder to the right heirs of the said A. for ever; Lord Macclesfield said that upon articles the case was stronger than on a will; that articles were only minutes or heads of the agreement of the parties, and ought to be so modelled when they came to be carried into execution as to make them effectual; and that the intention was to give A. only an estate for life; that if it had been otherwise the settlement would have been vain and ineffectual, and it would have been in A.'s power as soon as the articles were made to have destroyed them. And his lordship therefore held that A. was entitled to an estate for life only, and that his eldest son took by purchase, as tenant in tail.[2]

Court will decree a strict settlement in conformity with presumed intention.

As to executory trusts in wills—

Executory trusts in wills.

The intention of the testator must appear from the will itself that he meant "heirs of the body," or words of similar legal import, to be words of purchase; otherwise courts of equity will direct a settlement to be made according to the strict legal construction of those words. Suppose, for instance, a devise to trustees in trust to convey to A. for life, and after his decease to the heirs of his body; as no indication of intention appears that the issue of A. should take as purchasers, the rule of law will prevail, and A. will take an estate tail,

Construed strictly in the absence of an expressed intention to the contrary

[1] 1 P. W. 622.

[2] Affd. in H. of Lds. 5 Brown, P. C. Toml. ed. 122; *Streatfield* v. *Streatfield*, Ca. t. Talb. 176.

although, as we have already seen, in the case of marriage articles similarly worded, he would take only as tenant for life. Thus, in *Sweetapple* v. *Bindon*,[1] B., by will, gave £300 to her daughter Mary, to be laid out by her executrix in lands, and settled to the only use of her daughter Mary and her children, and if she died without issue, the land to be equally divided between her brothers and sisters then living. Lord Cowper said that had it been an immediate devise of land Mary the daughter would have been, by the words of the will, tenant in tail; and in the case of a voluntary devise, the court must take it as they found it, and not lessen the estate or benefit of the legatee, although upon the like words in marriage articles it might be otherwise. Illustrative of the same point, and also of the distinction between executed and executory trusts in wills, is the case of *Papillon* v. *Voice*.[2] There A. bequeathed a sum of money to trustees in trust, to be laid out in a purchase of lands, *to be settled* on B. for life, without impeachment of waste, remainder to trustees and their heirs during the life of B. to preserve contingent remainders, remainder to the heirs of the body of B., remainder over, with power to B. to make a jointure; and by the same will A. *devised lands* to B. for his life, without impeachment of waste, remainder to trustees and their heirs during the life of B. to preserve contingent remainders, remainder to the heirs of the body of B., remainder over. Lord Chancellor King declared, as to that part of the case where lands were devised to B. for life, though said to be without impeachment of waste, with remainder to trustees to preserve contingent remainders, remainder to the heirs of the body of B., this last remainder was within the general rule and must operate as words of limitation, and consequently create a vested estate tail in B., and that the breaking into this rule would occasion the utmost uncertainty; but as to the other part, he declared

[1] 2 Vern. 536. [2] 2 P. W. 571.

the court had power over the money directed by the will to be invested in land, and that the diversity was where the will passed a legal estate, and where it was only executory, and the party must come to the court in order to have the benefit of the will; that in the latter case the intention should take place, and not the rules of law; so that as to the lands to be purchased, they should be limited to B. for life, with power to B. to make a jointure, remainder to trustees during his life to preserve contingent remainders, remainder to his first and every other son in tail male successively, remainder over.

What expressions have been held to show a contrary intention.

In the following cases it was held that there had been a sufficient indication of the testator's intention that the words "heirs of the body," or words of similar import, should be construed as words of purchase, and not of limitation, viz., where trustees were directed to settle an estate upon A. and the heirs of his body, taking special care that it should not be in the power of A. to dock the entail of the estate given to him during his life;[1] or again "in such manner and form . . . as that if A. should happen to die without leaving lawful issue, then that the property might after his death descend unencumbered to B.,"[2] so also a direction that the settlement shall be made "as counsel shall advise," has been held to indicate an intention that there should be a strict settlement.[3]

Voluntary trusts.

Voluntary trusts.

Preliminary to entering upon the subject of voluntary conveyances and trusts, it may be useful to lay down a few principles of general application to the subject.

General rules.

I. The principle of the maxim, *Ex nudo pacto non oritur actio*, is as universally recognised in equity as at

[1] *Leonard* v. *Sussex*, 2 Vern. 526.
[2] *Thompson* v. *Fisher*, L. R. 10 Eq. 207.
[3] *Bastard* v. *Proby*, 2 Cox, 6.

Ex nudo pacto non oritur actio.

law. Thus, in *Jefferys* v. *Jefferys*,[1] a father having by voluntary settlement conveyed certain freeholds, and covenanted to surrender certain copyholds to trust, in trust for the benefit of his daughters, afterwards devised part of the same estates to his widow, who, after his death, was admitted to some of the copyholds. A suit having been instituted by the daughters to have the trusts of the settlement carried into effect, and to compel the widow to surrender the copyholds to which she had been admitted, the Lord Chancellor said,—"The title of the plaintiffs to the freehold is complete . . . With respect to the copyholds I have no doubt that the court will not execute a voluntary contract; and my impression is, that the principle of the court to withhold its assistance from a volunteer applies equally whether he seeks to have the benefit of a contract, a covenant, or a settlement."[2]

Imperfect conveyance evidence of a contract.

2. An imperfect conveyance is in equity regarded as evidencing a contract, binding or not binding, as the case may be.

Trust may arise without consideration.

3. A trust may be raised without any consideration. In *Ellison* v. *Ellison*,[3] Lord Eldon says,—"I had no doubt that from the moment of executing the first deed, supposing it not to have been for wife and children, but for pure volunteers, those volunteers might have filed a bill in equity on the ground of their interest under the instrument. . . . I take the distinction to be that if you want the assistance of the court to constitute you *cestui que trust*, and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you *cestui que trust*."[4]

The whole of the cases on this subject bearing re-

[1] Cr. & Ph. 138.
[2] *Wilkinson* v. *Wilkinson*, 4 Jur. N. S. 47.
[3] 1 L. C. 229.
[4] *Jones* v. *Lock*, L. R. 1 Ch. 25.

ference to the above rule turn upon the question, whether the relation of trustee and *cestui que trust* has been established; a question of the greatest nicety, depending on various considerations which it is now proposed to examine.

Has relation of trustee and *cestui que trust* been constituted?

1. Cases where the donor has the legal as well as the equitable interest in the property which is the subject of contest.

1. Where donor is both legal and equitable owner.

(*a.*) If the conveyance to the donee in trust for him be actually and effectually made, as if a person, by a complete legal conveyance has transferred stock, no difficulty will arise, for then equity will enforce the trust even in favour of a volunteer against the author of the trust, and all subsequent volunteers.[1] And the rule is the same, not only if the donor has effectually conveyed the property to trustees for the donee, but also where the donor, being legal and equitable owner of property, declares himself a trustee for the donee; a binding trust is thus created. The distinction between this and the following class of cases, where the assignment of the legal estate has been left imperfect, is laid down by Lord Eldon in the case of *ex parte Pye*,[2] as follows: "It is clear that this court will not assist a volunteer,—that upon an agreement to transfer stock this court will not interpose. But if the party had declared himself to be the trustee of that stock, it becomes the property of the *cestui que trust* without more, and the court will act upon it." This distinction has recently been acted on, in the case of *Richardson* v. *Richardson*,[3] decided by Lord Hatherley when Vice-Chancellor. There A. by voluntary deed assigned all her personal property to B., and also executed a general power of attorney to him by way of further fortifying his title. Under these circum-

Trust actually executed.

Where donor declares himself a trustee.

[1] *Ellison* v. *Ellison*, 1 L. C. 223.
[2] *Ex parte Pye, ex parte Dubost*, 18 Ves. 140, 145.
[3] L. R. 3 Eq. 686.

stances, it was held that certain promissory notes passed, though not endorsed by A., and though B. had taken no steps with regard to them under the power. It is to be observed that in both these cases a power of attorney had been executed, which was apparently held evidence of a declaration of trust, so as to entitle those claiming under it to the assistance of the court.

Incomplete assignment of legal estate.

(*b.*) Cases where the donor, having the legal as well as equitable title, intended to make a complete legal conveyance, which, however, has not been effected.

Of property assignable at law.

(1.) If the property in such a case is of a species that admits of a complete conveyance or assignment at *law*, the donee will receive no aid from the court to perfect the gift.

Antrobus v. *Smith.*

Thus, in *Antrobus* v. *Smith*,[1] A. made the following endorsement upon the receipt for one of the subscriptions in the Forth and Clyde Navigation Company :— "I do hereby assign to my daughter B. all my right, title, and interest of and in the enclosed call, and all other calls in the F. and C. Navigation." There was no evidence that A. had parted with the paper. Held that no trust was created in favour of B. The Master of the Rolls said, "But this instrument was of itself incapable of conveying the property. It is said to amount to a declaration of trust. Mr Crawfurd was no otherwise a trustee than as any man may be called so who professes to give property by an instrument incapable of conveying it. He was not in form declared a trustee, nor was that mode of doing what he proposed in his contemplation. He meant a gift. He says he assigns the property, but it was a gift not complete. The property was not transferred by the act. Could he himself have been compelled to give

[1] 12 Ves. 39.

effect to the gift by making an assignment? There is no case in which a party has been compelled to perfect a gift which, in the mode of making it, he has left imperfect. There is a *locus pœnitentiae* as long as it is incomplete."

In *Searle* v. *Law*,[1] A. made a voluntary assignment of Turnpike Bonds and Shares in a Railway Company in trust for himself for life, and after his death for his nephew. He delivered the bonds and shares to B., but did not observe the formalities required by the Turnpike Road Act, and the deeds by which the company was formed, to make the assignment effectual. Held, on his death, that no interest either in the bonds or in the shares, passed by the assignment, and that B. ought to deliver them to A.'s executors. The Vice-Chancellor said, "If that gentleman had not attempted to make any assignment of either the bonds or the shares, but had simply declared in writing that he would hold them on the same trusts as are expressed in the deed, that declaration would have been binding on him, and whatever bound him would have bound his personal representative. But it is evident that he had no intention whatever of being himself a trustee for any one, and that he meant all the persons named in the deed as *cestui que trusts* to take the provision intended for them through the operation of that deed. He omitted, however, to take the proper steps to make that deed an effectual assignment, and therefore both the legal and the beneficial interest in the bonds and shares remained vested in him at his death." *Searle* v. *Law.*

(2.) But if the property conveyed or assigned be not such that it may properly be transferred at law, the conveyance or assignment of it will be held good if the donor has done all that he could do, to perfect the assignment. Of property not assignable at law.

[1] 15 Sim. 95.

Policy of Assurance.

Thus, in *Fortescue* v. *Barnett*,[1] J. B. made a voluntary assignment by deed of a policy of assurance upon his own life for £1000 to trustees upon trust, for the benefit of his sister and her children if she or they should outlive him. The deed was delivered to one of the trustees, and the grantor kept the policy in his own possession. No notice of the assignment was given to the Assurance Office, and J. B. afterwards surrendered for a valuable consideration, the policy and a bonus declared upon it, to the Assurance Office. Upon a bill filed by the surviving trustee of the deed to have the value of the policy replaced, the court held that, upon the delivery of the deed, no act remained to be done by the grantor to give effect to the assignment of the policy, and that he was bound to give security to the amount of the value of the policy assigned by the deed. The Master of the Rolls said,—"In the present case, the gift of the policy appears to me to have been perfectly complete without delivery. Nothing remained to be done by the grantor, nor could he have done what he afterwards did to defeat his own grant, if the trustees had given notice of the assignment to the Assurance Office. The question does not here turn upon any distinction between a legal and an equitable title, but simply upon whether any act remained to be done by the grantor, which to assist a volunteer this court would not compel him to do. I am of opinion, that no act remained to be done to complete the title of the trustees."

Bond assigned by memorandum not under seal.

In *Edwards* v. *Jones*,[2] the obligee of a bond, five days before her death, signed a memorandum not under seal, which was endorsed upon the bond, and which purported to be an assignment of the bond without consideration to a person to whom the bond was at the same time delivered. Held that the gift was incomplete, and that as it was without consideration, the court could not give effect to it. The Lord Chancellor

[1] 3 My. & K. 36. [2] 1 My. & Cr. 226.

said,—"The transaction being inoperative for the purpose of transferring the bond, which was a mere chose in action, the question comes to be whether the mere handing over of the bond . . . would constitute a good gift *inter vivos;* that is to say, whether the plaintiff would be entitled to the assistance of a court of equity for the purpose of carrying into effect the intention of the parties. Now, it is clear that this is a purely voluntary gift, and a gift which cannot be made effectual without the interposition of this court."[1]

The cases on this subject are very conflicting, but the rules regulating them have been clearly enunciated and applied in the case of *Pearson* v. *Amicable Assurance Office.*[2] There, G. T. effected an assurance on his life with the Amicable Society. He then executed a voluntary settlement of the policy, assigning it to trustees to hold on the trusts of the voluntary settlement, and at the same time gave the trustees an irrevocable power of attorney. G. T. died, and the trustees claimed the amount from the company, but their claim was resisted by the executors, who gave notice to the office not to pay the amount to the trustees. The Assurance Company paid the money into court. The Master of the Roll saids, "The question is whether this is a complete instrument, or whether it requires the assistance of a court of equity for its enforcement. I am of opinion that it is a complete and perfect instrument."

Assignment of Policies.

It may here be observed, that certain classes of policies have recently been made assignable at law.[3] Questions as to the assignment of securities of this nature will therefore, it is presumed, now fall under the class before mentioned,[4] on which *Antrobus* v. *Smith* is a leading authority.

[1] *Blakely* v. *Brady*, 2 Dr. & Walsh, 311.

[2] 27 Beav. 229.

[3] Policies of life assurance are assignable under 30 & 31 Vict., c. 144, and policies of marine insurance under 31 & 32 Vict., c. 86.

[4] p. 56 supra.

Parol declaration of trust binds personalty.

It has been held that a declaration by parol, of the trusts of personal property, is sufficient to create a trust. Thus, in *M'Fadden* v. *Jenkins*,[1] A. sent a verbal message to his debtor B., desiring him to hold the debt in trust for C. B. accepted the trust and acted on it by paying C. a small part of the trust-money. It was held that a trust had attached to the property, and that the transaction had amounted to the same thing, as if A. had declared himself, instead of B., a trustee of the debt for the plaintiff.

Where donor has only equitable estate, and directs trustees to hold.

II. Where the donor has only an equitable interest in the property assigned.

(*a.*) In this case if the settlor directs trustees to hold the property in trust for the donee, though without consideration, a trust is well and irrevocably created.[2]

Notice to trustees unnecessary except as against third parties.

It does not now seem to be considered necessary to the validity of the creation of a trust by the beneficial owner of property, that there should be notice to, or an acceptance, or declaration of the trusts by the trustees, in whom the legal interest is vested; notice is, however, necessary to protect the *cestui que trust* as against third parties.[3]

Where donor assigns his equitable interest.

(*b.*) Cases where, instead of giving directions to trustees to hold for the benefit of volunteers, the donor assigns his equitable interest, without consideration to another. Two cases occur where the assignment has regard—

(1.) To lands:

(2.) To personalty.

[1] 1 Ph. 153.

[2] *Bill* v. *Cureton*, 2 My. & K. 503.

[3] *Tiernay* v. *Wood*, 19 Beav. 330; *Donaldson* v. *Donaldson*, Kay, 711.

[4] *Donaldson* v. *Donaldson*, Kay, 719.

(1.) As to lands: As to lands.

In *Gilbert* v. *Overton*,[1] a settlor, holding an agreement for a lease, subject to rents and covenants, by voluntary deed, assigned all his interest to trustees, to hold upon the trusts thereby declared, and shortly afterwards took a lease under the agreement to himself. The legal estate was never assigned to the trustees. It did not appear, whether at the date of the settlement the settlor was entitled to call for an immediate lease. Held that the settlement was complete, and ought to be carried into execution. In giving judgment Lord Hatherley, then Vice-Chancellor, said —"It appears to me there are several reasons for upholding the settlement. In the first place, it contains a declaration of trust, and that is all that is wanted to make any settlement effectual. The settlor conveys his equitable interest, and directs the trustees to hold it upon the trusts thereby declared. Then he goes on to declare upon what trusts they are to hold. It is an exploded idea that in a voluntary instrument such a declaration of trust is sufficient. Such a declaration as I find here is just as good as if the testator had declared that he himself would stand possessed upon these trusts. In the second place, ... in the inception of the transaction there is nothing to show that the settlor had the power of obtaining a lease before the time when he did so, after the execution of the settlement. There is, therefore, nothing to show that the settlor did not, by the settlement, do all that it was in his power to do, to pass the property. If this were not sufficient, it would be impossible to make a voluntary settlement of property of this description."[2]

(2.) As to personalty, there has been a great difference of opinion arising from the principle of the common law, "that choses in action are not assign- As to personalty

[1] 2 H. & M. 110. [2] But see *Bridge* v. *Bridge*, 16 Beav. 322.

able;" but since the case of *Kekewich* v. *Manning*,[1] the doctrine laid down in *Meek* v. *Kettlewell*,[2] which was based on the rule of law, may now be considered as virtually overruled, and the weight of recent authority tends to show that the rule in this case is the same as that which was pointed out in *Gilbert* v. *Overton*;[3] that the settlement will be upheld where the settlor, being the equitable owner, has done all in his power to pass the property, or has made himself a trustee with regard thereto.

Donor must do all he can.

In *Kekewich* v. *Manning*, residuary estate, consisting of money in the funds, was bequeathed to a mother and daughter, in trust for the mother for life, and afterwards for the daughter absolutely. By a settlement made in contemplation of her marriage, the daughter assigned her interest under the will to trustees upon trust, for the issue of the intended marriage, and in default for a niece of the daughter, and the issue of the niece. The daughter's husband died soon after the marriage, of which there was no issue. The mother was not a party to the settlement, but had notice of it before the husband's death. *Held*, that even if the settlement was voluntary as regarded the trust in favour of the niece, it was a complete alienation, so as to be capable of enforcement at the instance of the trustees of the settlement, against the daughter, and against the trustees of another settlement which she made on a second marriage, inconsistent with the former settlement. Knight Bruce, L. J., said—"To state, however, a simple case—suppose stock or money to be legally vested in A. as a trustee for B., for life, and subject to B.'s life interest, for C. absolutely; surely it must be competent to C., in B.'s lifetime, with or without the consent of A., to make an effectual gift of C.'s interest to D., by way of mere bounty, leaving the legal interest, and legal title unchanged

[1] 1 De G. M. & G. 176.
[2] 1 Hare, 464.
[3] 2 H. & M. 116; May on Voluntary Conveyances, p. 409.
[4] *Ubi supra.*

and untouched. If so, can C. do this better or more effectually than by executing an assignment to D.?" In *Donaldson* v. *Donaldson*,[1] it was held that a voluntary assignment by deed of the assignor's interest in a sum of stock standing in the names of trustees upon trusts in favour of volunteers, was a complete transfer of such interest, as between the donee and the representative of the donor, although no notice of the deed was given to the trustees in the donor's lifetime. Wood, V. C., said—"The question is, in every case, Has there been a declaration of trust, or has the assignor performed such acts that the donee can take advantage of them, without requiring any further act to be done by the assignor, and if the title is so far complete that this court is not called upon to act against the assignor, it will assist the donee in obtaining the property from any person who would be treated as a trustee for him? . . . In this case there is no need whatever for the donee to call in aid the jurisdiction of this court against the original assignor or his representatives. All that they have to do, is to require the trustees who hold the fund, to transfer it to them."[2]

Donor's intention to constitute himself a trustee may be gathered from facts of the case.

The relation of trustee and *cestui que trust*, may be created in various ways. It is not essential that there should be an express declaration of trust, but the intention of the donor to constitute himself a trustee may be gathered from the facts of the case. In the recent case of *Penfold* v. *Mould*,[3] a married woman entitled to certain sums of stock and cash standing in court to her separate account, consented that the same should be transferred to her husband, and afterwards retracted her consent. It was there argued, and the argument was approved by the court, that such consent might constitute a valid declaration of trust; but on the whole case it was decided, that a trust had not

[1] Kay, 711.
[2] See *Re Way's Settlement*, 13 W. R. 149.
[3] L. R. 4 Eq. 562.

been created, inasmuch as it was competent for a married woman to retract her consent at any time before the transfer was actually completed.[1]

Voluntary settlements, 13 Eliz. c. 5.

By the *statute* 13 Eliz. c. 5., all covinous conveyances, gifts, alienations of lands or goods, whereby *creditors* might be in any wise disturbed, hindered, delayed, or defrauded of their just rights, are declared *utterly void*, but the act is not to extend to any estate or interest in lands, &c., *on good consideration* and *bonâ fide* conveyed to any person not having notice of such covin.

Settlement must be both on good consideration and *bonâ fide.*

This statute does not declare all voluntary conveyances to be void, but only all fraudulent conveyances to be void,[2] and whether a conveyance be fraudulent or not, is declared to depend upon its being made upon good consideration and *bonâ fide.* It is not sufficient that it be upon good consideration or *bonâ fide.* It must be both ; and therefore, if a conveyance or gift be defective in either particular, although it is valid between the parties and their representatives, yet it is utterly void as to creditors.[3]

Voluntary conveyances not necessarily fraudulent under 13 Eliz. c. 5.

The word "voluntary" is not to be found either in the statute 13 Eliz. c. 5., or in the 27 Eliz. c. 4. A voluntary conveyance may therefore be made of real or personal property, without any consideration whatever, and cannot be avoided by subsequent creditors unless it be of the description mentioned in the statute.[4]

Settlor being indebted at times does not *per se* invalidate conveyance.

It was for some time thought that the mere fact of the settlor being indebted at the time of his voluntary conveyance, was sufficient to invalidate that conveyance under the statute in favour of creditors, and certain

[1] See *Richardson* v. *Richardson*, L. R. 3 Eq. 686, and *Jones* v. *Lock*, L. R. 1 Ch. 25.
[2] *Holloway* v. *Millard*, 1 Mad. 414.
[3] St. 353.
[4] *Holloway* v. *Millard*, 1 Mad. 419.

dicta of Lord Westbury in *Spirett* v. *Willows*,[1] have been cited to support this view. It was there said, "that if the debt of the creditor by whom the voluntary conveyance is impeached, existed at the date of the settlement, and it is shewn that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement." The principle there laid down, which, as the evidence showed a plain intention to defraud, was unnecessary for the determination of the case, has been reconsidered in the recent case of *Freeman* v. *Pope*.[2] The bill there was filed for the administration of the estate of A., and to set aside a voluntary settlement executed by him some years previous to his death, by a creditor whose claim had accrued since the date of the settlement. It was proved that A. was perfectly solvent up to the date of the settlement, but its effect was to deprive him of the means of paying certain existing debts. Lord Hatherley, in deciding against the validity of the settlement, after reviewing the authorities, stated the law to be, that in the absence of direct proof of intention to defraud, if a person owing debts made a settlement which subtracted from the property which was the proper fund for payment of those debts, an amount without which the debts could not be paid, then the law would presume an intention to defeat and delay creditors, such as to bring the case within the statute.

Doctrine in *Spirett* v. *Willows* overruled.

The question as to what amount of indebtedness will raise the presumption of fraudulent intent, is one of evidence to be decided upon the facts of each case. Mere indebtedness will not suffice, nor, on the other hand, is it necessary to prove absolute insolvency. To quote the words of Lord Hatherley when Vice-Chancellor, in *Holmes* v. *Penney*:[3]—"The settlor must

What amount of indebtedness will raise presumption of fraudulent intent.

[1] 3 Deg. J. & S. 293; 34 L. J. Ch. 367. [2] L. R. 5 Ch. 538.
[3] 3 K. & J. 90; *Townsend* v. *Westacott* 2 Beav. 340.

have been at the time not necessarily insolvent, but so largely indebted as to induce the court to believe that the intention of the settlement, taking the whole transaction together, was to defraud the persons who at the time of making the settlement were creditors of the settlor."[1]

Stat. 27 Eliz., c. 4, for protection of purchasers.

The statute 27 Eliz., c. 4, was enacted for the protection of purchasers, as the statute 13 Eliz., c. 5, was for that of creditors. It enacts that every conveyance, grant, charge, lease, limitation of use, of, in or out of any lands, tenements, or other hereditaments whatsoever, for the intent and purpose to defraud and deceive such persons, &c., as shall purchase the said lands, or any rent or profit out of the same, shall be deemed only against such persons, their heirs, &c., who shall so purchase for money or any good consideration the said lands, &c., to be *wholly void*, frustrate, and of none effect.

Voluntary settlement void against subsequent purchaser.

A voluntary settlement of lands made in consideration of natural love and affection is void, as against a subsequent purchaser for valuable consideration, even though with notice,[2] for the very execution of a subsequent conveyance sufficiently evinces the fraudulent intent of the former one. It is, however, good as against the grantor, who therefore cannot compel specific performance of a subsequent contract for sale of lands so settled,[3] though the purchaser from him can.[4]

Chattels personal not within the statute.

Chattels personal, in which respect they differ from chattels real,[5] are not within the statute 27 Eliz., c. 4,

[1] See St. 362–365, where the English and American decisions on this point are fully reviewed and compared. May on Voluntary Conveyances, 41–47.

[2] *Doe* v. *Manning*, 9 East 59.

[3] *Smith* v. *Garland*, 2 Mer. 123.

[4] *Daking* v. *Whimper*, 26 Beav. 568.

[5] *Saunders* v. *Dehew*, 2 Vern. 272.

and therefore a voluntary settlement of chattels personal cannot be defeated by a subsequent sale.[1]

Purchaser—who.

A mortgagee[2] is a purchaser within the meaning of the statute; but a judgment creditor is not within the meaning of the act.[3]

It has been decided not only that a *bonâ fide* purchaser for value from the heir-at-law or devisee of one who has made a voluntary conveyance is not within the statute, but also that a person who purchases for value from one claiming under a second voluntary conveyance, or from any other than the person who made the voluntary conveyance in his lifetime, is equally excluded from the benefit of the statute.[4]

Bonâ fide purchaser under 13 Eliz., c. 5, and 27 Eliz., c. 4.

In 27 Eliz., c. 4, s. 4, there is a proviso, similar to that in 13 Eliz., c. 5, s. 5, in favour of a *bonâ fide* purchaser, that that act shall not extend to or be construed to defeat any conveyances, &c., of lands made upon or for good consideration, and *bonâ fide* to any person.

It must be noticed that in the former statute the phrase "good consideration" is considered as equivalent to valuable consideration, while in the statute 13 Eliz., c. 5, the same phrase has been held to include both meritorious and valuable consideration.

Bonâ fide purchaser.

Bonâ fide purchasers are such as take *bonâ fide*, and for a valuable consideration. And this leads us to the inquiry, What is a valuable consideration under this statute? Lawful considerations generally may be divided into two classes—

[1] *Bill* v. *Cureton*, 2 My. & K. 503; *M'Donell* v. *Heselrige*, 16 Beav. 346.

[2] *Chapman* v. *Emery*, Cowp. 279.

[3] *Beavan* v. *Earl of Oxford*, 6 De G. M. & G. 507.

[4] *Doe* v. *Rusham*, 17 Q. B. 723; *Lewis* v. *Rees*, 3 K. &. J. 132. *Richards* v. *Lewis*, 11 C. B. 1035;

Considera-tion—1. Meritorious.

1. Meritorious or good considerations importing a consideration of blood or natural affection, as when a man grants an estate to a near relation; and which are merely founded upon motives of generosity, prudence, and natural duty. Such a consideration will not avail to support a conveyance as against a purchaser for value.

2. Valuable.

2. Valuable consideration is the consideration of *money*, *marriage*, or the like, which the law esteems as an equivalent given for the grant.

Marriage consideration under 27 Eliz., c. 4.

The consideration of marriage has always been recognised by courts of law and equity as a valuable one; and previous to the Statute of Frauds a mere promise by the intended husband to settle property upon the intended wife was upheld by the subsequent marriage. The Statute of Frauds, 29 Car. II., c. 3, s. 4, did not change the principle, but only required an additional circumstance by way of evidence,—that such ante-nuptial agreement should be in writing, in order that it should bind the husband. In this case, therefore, of an ante-nuptial agreement followed by marriage, the wife becomes a purchaser within the statute 27 Eliz. c. 4.[1]

Post-nuptial settlement in pursuance of ante-nuptial parol agreement.

It is not quite settled whether a post-nuptial settlement, made in consideration, and in pursuance of, an ante-nuptial parol agreement, is good as against a subsequent purchaser for value even with notice, under the 27 Eliz., c. 4.[2] It is clear on all the authorities that a mere post-nuptial settlement, without any ante-nuptial agreement, is void against a subsequent purchaser for value, even with notice.[3]

But though a post-nuptial voluntary settlement

[1] *Kirk* v. *Clark*, Prec. in Ch. 275.

[2] *Dundas* v. *Dutens*, 2 Cox, 235; *Spurgeon* v. *Collier*, 1 Eden. 55; *Warden* v. *Jones*, 2 De G. & Jo. 76.

[3] *Butterfield* v. *Heath*, 15 Beav. 408; *Warden* v. *Jones*, 2 De G. & Jo. 76.

made by the husband or wife is within the provisions of the 27 Eliz., c. 4, and is void against a subsequent purchaser of that estate, still a court of equity is willing to support such a *bonâ fide* post-nuptial settlement on a very slight consideration. Thus, in *Hewison* v. *Negus*,[1] it was decided that if the wife's real estate, of which her husband would be entitled to receive the rents and profits during her coverture, be settled on her for life, for *her separate use*, &c., with remainder to the children, by a post-nuptial settlement it is not void as against a subsequent purchaser from the husband and wife, as a voluntary settlement under the 27 Eliz., c. 4. "I concur," said the Master of the Rolls, "with the argument which was urged, that the surrender by the husband of his right to receive the rents and profits of the hereditaments during coverture, and his giving his wife a sole and exclusive power and control over them, is a valuable consideration sufficient to support this settlement."

Bonâ fide post-nuptial settlement supported on slight consideration.

It may here be observed that under the Bankruptcy Act, 1869,[2] an exception is made in favour of settlements (which term for the purposes of the section is to include any conveyance or transfer of property) made by a trader "on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife," which are declared good as against the trustee in bankruptcy, irrespective of any question as to whether the settlor was solvent or not.

Trader's post-nuptial settlement on wife and children under Bankruptcy Act 1869.

There have been some cases in which the question has been, how far the consideration of marriage will extend, and whether limitations in favour of very remote objects may not be void as against subsequent purchasers. A limitation to the issue of the settlor by

Who are within the scope of the marriage consideration.

[1] 16 Beav. 594; and see *Baypoole* v. *Collins*, L. R. 6 Ch. 228.

[2] 32 & 33 Vict., c. 71, s. 91.

a second marriage was held *not* to be voluntary.[1] So a settlement on her marriage, made by a woman of her property, as a provision for her illegitimate child, was upheld as against a subsequent mortgagee.[2] But a limitation to the brothers of a settlor was held voluntary.[3]

But limitations in favour of collaterals will be supported if there be any party to the settlement who purchases in their behalf.[4]

Trust in favour of creditors, if not communicated to them, revocable.

To the general rule that a declaration of trust in favour of volunteers by the legal or equitable owner of realty or of personalty is irrevocable, there is an important exception in the class of cases where a debtor without the knowledge of his creditors, makes a transfer of property to trustees for payment of his debts. Such a transaction does not invest creditors with the character of *cestui que trusts*, but amounts merely to a direction to the trustees as to the mode in which they are to apply the property vested in them, for the benefit of the owner of the property, the debtor, who alone stands to them in the relation of *cestui que trust*, and can vary or revoke the trusts at pleasure.[5] In *Walwyn* v. *Coutts*,[6] a father conveyed his estates to trustees for paying off annuities granted by his son, together with the arrears, and also, his son's debts, if they thought proper. The annuitants were mentioned in a schedule, but were neither parties nor privies to the deed. The father and son then executed other deeds varying the former trusts. A motion by one of the scheduled creditors to restrain the trustees from executing the trusts of the subsequent

Amounts to a mere direction to trustees as to mode of disposition.

[1] *Clayton* v. *E. of Winton*, 3 Mad. 302,*n*; *Newstead* v. *Searles*, 1 Atk. 265.

[2] *Clarke* v. *Wright*, 6 H. & N. 849.

[3] *Johnson* v. *Legard*, 6 M. & S. 60; *Stackpoole* v. *Stackpoole*, 4 Dru. & Warr. 320.

[4] *Heap* v. *Tonge*, 9 Hare, 104; *Pulvertoft* v. *Pulvertoft*, 18 Ves. 92.

[5] May on Voluntary Conveyances, p. 397.

[6] 3 Sim. 14.

deeds until they performed the trusts of the first, was refused.

Thus again, in *Garrard* v. *Lauderdale*,[1] it was held that an assignment of personal property to trustees, for payment of certain scheduled creditors who did not execute the deed or conform to its terms, although the execution of the deed had been communicated to them, could not be enforced. So far from conforming to its terms, the plaintiff came under the decree made in the suit for the administration of the debtor's estate, and proved his debt before the master *after* the receipt of the letter informing him of the conveyance to the trustees. In the judgment it was said,—"I take the real nature of the deed to be, not so much a conveyance vesting a trust in A. for the benefit of the creditors of the grantor, but rather an arrangement made by the debtor for his own personal convenience and accommodation—for the payment of his own debts in an order prescribed by himself, over which he retains power and control, and with respect to which the creditors can have no right to complain, inasmuch as they are not injured by it—they *waive no right of action* and are *not executing parties* to it."

An arrangement for the debtor's own benefit and convenience.

In *Acton* v. *Woodgate*,[2] the debtor made two conveyances; the *first* was not communicated to any creditor except the trustees who were also creditors; the *second* conveyance was made to the same trustees for the payment of their own debts, and of all other debts due by the debtor, and was executed by several creditors who were not privy to the first. The trusts of the *second* conveyance were decreed to be carried into execution. In the judgment, the following remarks were made, "It is established by the authorities which have been referred to, that if a debtor conveys property in trust for the benefit of his creditors to whom the

[1] 3 Sim. 1. [2] 2 My. & K. 495.

conveyance is not communicated, and the creditors are not in any manner privy to the conveyance, the deed merely operates as a power to the trustees, which is revocable by the debtor, and has the same effect as if the debtor had delivered money to an agent to pay his creditors, and before any payment made by the agent, or communication made by him to the creditors, had recalled the money so delivered."

Effect of communication to creditors.

The learned judge then proceeds to say—"In the case of *Garrard* v. *Lauderdale*, it seems to have been considered that a communication by the trustees to creditors, of the fact of such a trust, would not defeat the power of revocation by the debtor. It appears to me, however, that this doctrine is questionable, because the creditors being aware of such a trust might be *thereby induced to a forbearance in respect of their claims which they would not otherwise have exercised.*"

There has been a considerable conflict of dicta, as to whether the mere fact of communication of a trust in favour of creditors to such creditors, will deprive the donor of that power of revocation, which it has been shown he possesses. It is submitted that the true principle is correctly laid down by Sir John Leach, M.R., in *Acton* v. *Woodgate*,[1] and that the trust, after communication, is irrevocable, if the creditors have been "thereby induced to a forbearance in respect of their claims which they would not have otherwise exercised," or in the words of Sir J. Romilly, M. R., in *Biron* v. *Mount*,[2] "The principle is well laid down by Lord St Leonards in *Field* v. *Donoughmore*,[3] where he states, 'It is not absolutely essential that the creditor should execute the deed; if he has assented to it, and if he has acquiesced in it, or acted under its provisions and complied with its terms, and the other side express no

Trust irrevocable after communication, when creditor's position is altered thereby.

[1] 2 My. & K. 495. [2] 24 Beav. 649.
[3] 1 Dru. & War. 227.

dissatisfaction, the settled law of the court is that he is entitled to its benefits.' About that I entertain no doubt, but I apprehend for this purpose he must do some acts which amount to acquiescence. It is not sufficient merely to stand by, and take no part at all in the matter. It is true that in some cases, as is said in the case of *Nicholson* v. *Tutin*,[1] something may be inferred from his standing by, until he has lost a remedy which he might have had at law, if he had not come in under the deed. But no such question arises here. In my opinion, he must do some act."[2] Where a creditor is party to a deed whereby his debtor conveys property to a trustee to be applied in liquidation of the debts due to that creditor, the deed is as to that creditor irrevocable.[3]

Or where creditor a party to deed.

A creditor who for a long time delays,[4] or sets up a title adverse to the deed,[5] will not be allowed to claim the benefit of its provisions.

Closely allied with the subject of assignments to trustees in favour of creditors, is that of equitable assignments.

Equitable Assignments.

"The great wisdom and policy of the sages and founders of our law," says Lord Coke, "have provided that no possibility, right, title, nor thing in action, shall be granted or assigned to strangers; for that would be the occasion of multiplying of contentions and suits, of great oppression of the people, and the subversion of the due and equal execution of justice."[6]

General rule of law.

[1] 2 K. & J. 23.

[2] *Kirwan* v. *Daniel*, 5 Hare, 499; *Griffith* v. *Ricketts*, 7 Hare 307; *Cornthwaite* v. *Frith*, 4 De G. & Sm. 552; *Siggers* v. *Evans*, 5 Ell. & B. 367.

[3] *Mackinnon* v. *Stewart*, 1 Sim. N. S. 88; *Le Touche* v. *Earl of Lucan*, 7 C. & F. 772; *Montefiore* v. *Brown*, 7 H. L. Cas. 241–266.

[4] *Gould* v. *Robertson*, 4 De G. & Sm. 509.

[5] *Watson* v. *Knight*, 19 Beav. 369.

[6] 10 Co. 48.

Disregarded by equity.

The reasons given by Lord Coke for this rule of law which prevents the assignment of a possibility or chose in action, have been almost wholly disregarded by courts of equity; and, accordingly, from a very early period, assignments of a mere naked possibility, or of a chose in action, for valuable consideration, have been held valid in equity, which will carry them into effect upon the same principle that it enforces the performance of an agreement, when not contrary to its own rules, or public policy.[1] A mere expectancy, therefore, as that of an heir-at-law to the estate of an ancestor,[2] or the interest which a person may take under the will of another then living,[3] non-existing property to be acquired at a future time, as the future cargo of a ship,[4] is assignable in equity for valuable consideration; and where the expectancy has fallen into possession, the assignment will be enforced.[5] Even the common law has broken in upon its own rule, prohibiting the assignment of choses in action, as in the case of negotiable instruments, and some few other securities, or where a debtor assents to the transfer of the debt, so as to enable the assignee to maintain a direct action against him, on the implied promise which results from such assent.[6] And in the case of assignments of bond or other debts which are an exception to the above-mentioned rule, it is necessary to sue in the name of the original creditor; the person to whom it is transferred being regarded rather as an attorney than as an assignee.[7]

Infringed even by the common law.

Contingent interests and possibilities.

By 8 & 9 Vict., c. 106, s. 6., contingent and future interests and possibilities coupled with an interest in real estate may now be granted or assigned in law; this act, it will be observed, does not render assign-

[1] *Squib* v. *Wyn*, 1 P. Wms. 378.
[2] *Hobson* v. *Trevor*, 2 P. W. 191.
[3] *Bennet* v. *Cooper*, 9 Beav. 252.
[4] *Lindsay* v. *Gibbs*, 22 Beav. 522.
[5] *Holroyd* v. *Marshall*, 10 H. L. Cas. 191.
[6] *Baron* v. *Husband*, 4 B. & Ad. 611.
[7] *De Pothonier* v. *De Mattos*, Ell. Bl. & Ell. 467.

ments of contingent interest or possibilities in *chattels*, or mere naked possibilities *not* coupled with an interest, valid at law; the exclusive jurisdiction, therefore, of courts of equity, as to such assignments, is untouched by the act.

Policies of life and marine insurance.

By 30 & 31 Vict., c. 144, policies of life assurance may be legally assigned in the form provided by the act, either by endorsement on the policy, or by separate instrument; and by 31 & 32 Vict., c. 86, policies of marine insurance may similarly be assigned by endorsement in statutory form.

Order given by debtor to his creditor upon a third person.

In equity, an order given by a debtor to his creditor upon a third person having funds of the debtor, to pay the creditor out of such funds, is a binding equitable assignment of so much money. Nor is it necessary, as it would appear by some of the decisions at law, that the party receiving the order should in some way enter into a contract.

In *Burn* v. *Carvalho*,[1] A. having goods in the hands of B. as his agent at a foreign port, and being under liabilities to C., by letter to C. promised that he would direct, and, by a subsequent letter to B., did direct B. to deliver over the goods to D. as the agent of C. at that port. Before the delivery of the goods, a commission of bankrupt issued against A. under an act of bankruptcy committed while his letter was on its way to B., and the goods were delivered by B. to D. in ignorance of the bankruptcy. Held that C. had a good title in equity to the goods.

Again, in *Diplock* v. *Hammond*,[2] A. having obtained a loan from B., gave him the following instrument addressed to his (A.'s) debtor:—"I hereby authorise you to pay £365, being the amount of my contract, B.

[1] 4 My. & Cr. 690. [2] 2 Sm. & G. 141; 5 De G. M. & G. 320.

having advanced me that sum." Held a valid equitable assignment.[1]

Mandate from principal to agent.

A mere mandate from a principal to his agent, not communicated to a third person, will give him no right or interest in the subject of the mandate. It may be revoked at any time before it is executed, or at least before any engagement is entered into with a third person to execute it for his benefit.[2]

A power of attorney.

A mere power of attorney or authority to a person to receive money, directing him to pay it to a creditor of the party granting the power or authority, will not amount to an equitable assignment. Thus, in *Rodick* v. *Gandell*,[3] a railway company was indebted to the defendant, their engineer, who was greatly indebted to his bankers. The bankers having pressed for payment or security, the defendant, by letter to the *solicitors* of the company, authorised them to receive the money due to him from the company, and requested them to pay it to the bankers. The solicitors, by letter, promised the bankers to pay them such money, on raising it. Held that this did not amount to an equitable assignment of the debt. "The extent of the principle," said Lord Truro, "to be deduced from the cases is, that an agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor, will create a valid equitable charge upon such fund; in other words, will operate as an equitable assignment of the debts or fund to which the order refers. I think that a decision, that the authority to the solicitors contained in the letter, to receive the debt due from the railway company, and to pay what should be received to the

Equitable assignment—what.

[1] *Farquhar* v. *City of Toronto*, 12 Gr. 186.
[2] *Morrell* v. *Wooten*, 16 Beav. 197. [3] 1 De G. M. & G. 763.

bank, operated as an assignment in equity of the railway debts, would be to extend the principle much beyond the warrant of the authorities. If an assignment of the debts had been intended, it would have beeu quite as easy to have directed the order to the railway company as to the solicitors. It rather seems to have been intended that the bank should have no title or interest in the debts until the amount of the debts should have been adjusted, and some definite portion been adjusted and realised."

Notice to legal holder by assignee of chose in action necessary to perfect title.

In order that third parties may be bound, it is necessary, with regard to a chose in action, for the assignee, to do all that can be done to perfect the assignment, to do everything towards having possession, which the subject admits; to do "that which is tantamount to obtaining possession by placing every person who has an equitable or legal interest in the matter under au obligation to treat it as his property. For this purpose he must give notice to the legal holder of the fund: in the case of debt, for instance, notice to the debtor is for many purposes tantamount to possession. If he omit to give that notice, he is guilty of the same degree and species of neglect as he who leaves a personal chattel to which he has acquired a title, in the actual possession, and under the absolute control of another person." Notice, then, is necessary to perfect the title, to give a complete right *in rem*, and not merely a right as against him who conveys his interest. If the assignee is willing to trust the personal credit of the man, and is satisfied that he will make no improper use of the possession in which he is allowed to remain, notice is not necessary, for against him the title is perfect without notice. But if he, availing himself of the possession as a means of obtaining credit, induces third persons to purchase from him as the actual owner, and they part with their money before the assignees' pocket-convey-

Tantamount to possession.

Gives a right *in rem*.

ance is notified to them, the assignee must be postponed. On being postponed, the assignee's security is not invalidated; he had priority, but that priority has not been followed up; he has permitted another to acquire a better title to the legal possession.[1] Where an assignee has done all in his power towards taking possession, he will not lose his priority.[2]

Assignee of chose in action takes it subject to equities.

The assignee of a chose in action, although without notice, in general takes it subject to all the equities which subsist against the assignor. Thus, in *Turton* v. *Benson*,[3] where a son on his marriage was to have £3000 portion with his wife, and privately, without notice to his parents, who treated for the marriage, gave a bond to the wife's father to pay back £1000 of the portion seven years after; the bond was afterwards assigned for the benefit of creditors; it was held that the bond being void in equity, it would not be made better by the assignment.[4]

But though this rule generally holds good, it has been observed that length of time and circumstances may make the case of the assignee stronger.[5]

Exception as to negotiable instruments.

An exception to the rule also occurs in the case of negotiable instruments, "because, if the rule were otherwise," Lord Keeper Somers observed, "it would tend to destroy trade, which is carried on everywhere by bills of exchange, and he would not lessen an honest creditor's security."[6] And the rule will yield in equity where a contrary intention appears from the nature and terms of the contract between the original contracting

[1] *Ryall* v. *Rowles*, 2 L. C. 670; *Dearle* v. *Hall*, 3 Russ. 1; *Buller* v. *Plunket*, 1 J. & H. 441.

[2] *Feltham* v. *Clark*, 1 De G. & Sm. 307; *Langton* v. *Horton*, 1 Hare, 549.

[3] 1 P. Wms. 496.

[4] *Barnett* v. *Sheffield*, 1 De G. M. & G. 371; *Athenæum Life Assurance Society* v. *Pooley*, 3 De G. & Jo. 294; *Graham* v. *Johnson*, L. R. 8 Eq. 36.

[5] *Hill* v. *Caillovel*, 1 Ves. Sr. 123.

[6] *Anon.* Com. Rep. 43.

parties. Thus debentures made payable to bearer were held to bind the company issuing them, as against transferees for value, irrespective of any equities between the company and the original holders.[1] Debentures payable to bearer.

As in the case of agreements, a court of equity will not, upon the ground of public policy, give effect to assignments of pensions and salaries of public officers, payable to them for the purpose of keeping up the dignity of their office, or to assure a due discharge of its duties. Thus the pay of an officer in the army,[2] and the salary of a judge given to him to support the dignity of his office,[3] have been held not assignable. Assignments contrary to public policy.

Courts of equity, on principles of public policy, will not give effect to assignments which partake of the nature of champerty, or maintenance, or buying of pretended titles.[4] Thus, in *Stevens* v. *Bagwell*,[5] one-fifth part of the share of prize money, the subject of a suit *then depending* in the Admiralty Court, was assigned by the executrix of one of the captors, and her husband, to a navy agent, in consideration of his indemnifying them from all costs on account of any suit touching the said prize money, and paying to them the remaining four-fifths, if it should be recovered. *Held*, that the assignment was void as amounting to that species of maintenance which is called champerty, viz., the unlawful maintenance of a suit in consideration of a bargain for part of the thing, or some profit out of it.[6] Champerty and maintenance.

Upon the same principle of not giving any encouragement to litigation, especially when undertaken

[1] *In re Blakely Ordinance Company*, L. R. 3 Ch. 154. *In re General Estates Company*, ib. 758.

[2] *Stone* v. *Lidderdale*, 2 Anst. 533.

Arbuthnot v. *Norton*, 5 Moore's P. C. C. 219; *Grenfell* v. *The Dean and Canons of Windsor*, 2 Beav. 550.

[4] *Reynell* v. *Sprye*, 1 De G. M. & G. 660.

[5] 15 Ves. 139.

[6] *Earle* v. *Hopwood*, 9 C. B. (N. S.) 566.

as a speculation, equity will not enforce the assignment of a mere naked right to litigate, *i.e.*, which, from its very nature is incapable of conferring any benefit except through the medium of a suit, such as a mere naked right to set aside a conveyance for fraud.[1]

Purchase *pendente lite*, where permitted.

But the purchase of an interest *pendente lite*,[2] or a mortgage *pendente lite*,[3] or the advance of money for carrying on a suit, if the parties have a common interest,[4] or if there exists between the parties the relation of father and son,[5] or master and servant,[6] will not be considered as maintenance or champerty.[7]

A purchase by an attorney *pendente lite*, of the subject matter of the suit is invalid.[8]

Trusts how created.

No particular form of expression is necessary to the creation of a trust, if, on the whole, it can be gathered that a trust was intended. There are many cases arising chiefly under wills, in which it is very difficult to determine whether or not a trust was intended to be created. "As a general rule," observes Lord Langdale,[9] "it has been laid down that when property is given absolutely to any person, and the same person is, by the giver who has power to command, recommended, or entreated, or wished to dispose of that property in favour of another, the recommendation, entreaty, or wish shall be held to create a trust:—

"*First*, If the words are so used that on the whole they ought to be construed as imperative.

[1] *Prosser* v. *Edmonds*, 1 Y. & C. Exch. Ca. 481; *Powell* v. *Knowles*, 2 Atk. 226.
[2] *Knight* v. *Bowyer*, 2 De G. & Jo. 421, 455.
[3] *Cockell* v. *Taylor*, 15 Beav. 103, 117.
[4] *Hunter* v. *Daniel*, 4 Hare, 420.
[5] *Burke* v. *Green*, 2 Ball. & B. 521.
[6] *Wallis* v. *D. of Portland*, 3 Ves. 503.
[7] *Dickinson* v. *Burrel*, 14 W. R. 412.
[8] *Simpson* v. *Lamb*, 7 Ell. & Bl. 84; *Anderson* v. *Radcliffe*, 6 Jur. N. S. 578.
[9] *Knight* v. *Knight*, 3 Beav. 172; 11 C. & F. 513.

"*Secondly*, If the subject of the recommendation or wish be certain.

"*Thirdly*, If the objects or persons intended to have the benefit of the recommendation or wish be also certain.

"If a testator gives £1000 to A., desiring, wishing, recommending, or hoping that A. will, at his death, give the same sum, or any part of it to B., it is considered that B. is an object of the testator's bounty, and A. a trustee for him. No question arises on the intention of the testator, upon the sum or subject intended to be given, or upon the person or object of the wish.

"So, if a testator gives the residue of his estate, after certain purposes are answered, to A., recommending A., after his death, to give it to his own relations, or such of his own relations as he shall think most deserving, or as he shall choose, it has been considered that the residue of the property, though a subject to be ascertained, and that the relations to be selected, though persons or objects to be ascertained, are nevertheless so clearly and certainly ascertainable, so capable of being made certain, that the rule is applicable to such cases. On the other hand, if the giver accompanies his expression of wish or request by other words from which it is to be collected that he did not intend the wish to be imperative; or if it appears from the context that the first taker was intended to have a discretionary power to withdraw any part of the subject from the object of the wish or request; or if the objects are not such as may be ascertained with sufficient certainty, it has been held that no trust is created. Thus, the words 'free and unfettered,' accompanying the strongest expression of request, were held to prevent the words of bequest being imperative.

No trust if there is a discretion.

Or where first taker may apply any part to his own use.

Any words by which it is expressed, or from which it may be implied, that the first taker may apply any part of the subject to his own use, are held to prevent the subject of the gift from being considered certain; and a vague description of the object, that is, a description by which the giver neither clearly defines the object himself, nor names a distinct class out of which the first taker is to select, or which leaves it doubtful what interests the objects are to take, will prevent the objects from being certain within the meaning of the rule, and in such cases we are told that the question 'never turns upon the grammatical import of words—they may be imperative, but not necessarily so; the subject matter, the situation of the parties, and the probable intent, must be considered.'" [1]

Recommendation must be imperative.

First, The words of recommendation used must be such that upon the whole they ought to be construed as imperative. No technical words are necessary, but the testator's intent is to be carried out, and his words "willing or desiring" that the person on whom he has conferred property should make a disposition of it in favour of certain objects will be construed as imperative, and amount to a trust; as also the words and phrases "wish and request," [2] "have fullest confidence," [3] "heartily beseech," [4] "well know," [5] "of course he will give." [6]

Subject-matter must be certain.

Secondly, The subject-matter of the recommendation or wish must be certain. Thus in *Buggins* v. *Yates*,[7] where a testator, who, having devised real property to

[1] *Meggison* v. *Moore*, 2 Ves. Jr. 632; *Bernard* v. *Minshull*. Johnson, 276.

[2] *Godfrey* v. *Godfrey*, 11 W. R. 554; *Liddard* v. *Liddard*, 28 Beav. 266.

[3] *Shovelton* v. *Shovelton*, 32 Beav. 143.

[4] *Meredith* v. *Heneage*, 1 Sim. 553.

[5] *Bardswell* v. *Bardswell*, 9 Sim. 319.

[6] *Robinson* v. *Smith*, Mad. & Geld. 194.

[7] 9 Mod. 122.

his wife to be sold for payment of his debts and legacies in aid of his personal estate, declared that he *did not doubt* but his wife would be kind to his children, it was insisted that this constituted a trust of the personal estate; but the court was of opinion that these words gave a right to no child in particular, or a right to any particular part of the estate, but that the clause was void for uncertainty.

Again, in *Curtis* v. *Rippon*,[1] the testator, after appointing his wife guardian of his children, gave all his property to her, "trusting that she would, in fear of God, and in love to the children committed to her care, make such use of it as should be for her own and their spiritual and temporal good, remembering always, according to circumstances, the Church of God and the poor." *Held*, that the wife was absolutely entitled to the property; there being no ascertained part of it provided for the children, and the wife being at liberty, at her pleasure, to diminish the capital either for the Church or the poor, and that the plain intention of the testator was to leave the children dependent on the wife.

Where there is an absolute gift of property to a person, and a recommendation to give to a certain object "what shall be left" at his death, "or what he shall die possessed of," the subject will be considered uncertain.[2]

Thirdly, The object or persons intended to have the benefit of the recommendation or wish must be certain. Thus, in *Sale* v. *Moore*,[3] where a testator bequeathed the residue of his property to his wife, not doubting that she would consider his near relations as he would

The object must be certain.

[1] 5 Mad. 434.
[2] *Pope* v. *Pope*, 10 Sim. 1; *Green* v. *Marsden*, 1 Drew. 646; *Constable* v. *Bull*, 3 De G. & Sm. 411.
[3] 1 Sim. 534.

have done if he had survived her. The V. C. held that the objects were uncertain. "Who were the objects of the trust? Did the testator," he asked, "mean relations at his own death, or at his wife's death? Did he mean that she should have the liberty of executing the trust the day after his death?"

Leaning against construing precatory words as trusts.

The tendency of the later decisions is against construing precatory or recommendatory words as trusts. If, therefore, the giver accompanies his expression of wish or request by other words from which it is to be collected that he did not intend the wish to be imperative, or if it appears from the context that the first taker was intended to have a discretionary power to withdraw any part of the subject from the object of the wish or request, or where the motive by which the giver was actuated is stated, no trust will be created.[1] So where there was a gift of stock to a person, and there was added parenthetically (to enable him to assist such children of my deceased brother as he may find deserving of encouragement), it was held an absolute bequest, and that no trust was created for the children.[2]

If trust be intended, legatee cannot take beneficially.

It is most important to observe that although vagueness in the object will unquestionably furnish reason for holding that no trust was intended, yet this may be countervailed by other considerations which show that a trust was intended, while at the same time such trust is not sufficiently certain and definite to be valid and effectual; and it is not necessary to exclude the legatee from taking a beneficial interest that there should be a valid or effectual trust; it is only necessary that it should clearly appear that a trust was intended. Thus, in *Briggs* v. *Penny*,[3] the testatrix, after giving, among other legacies, a sum of £3000 to

Briggs v. *Penny.*

[1] *Howorth* v. *Dewell*, 29 Beav. 18; *Lambe* v. *Eames*, L. R. 10 Eq. 267.

[2] *Benson* v. *Whittam*, 5 Sim. 22.

[3] 3 Mac. & G. 546.

Sarah Penny, and a like sum of £3000 in addition for the trouble she would have as executrix, bequeathed all her residuary personal estate to the said Sarah Penny, "well knowing that she will make a good use and dispose of it in a manner in accordance with my views and wishes." The testatrix appointed Sarah Penny sole executrix of her will. It was held by Lord Truro, affirming the decision below, that Sarah Penny did not take the residue for her own benefit. "There is nothing," said his lordship, "on the face of the words which necessarily implies what is vague and indefinite, as in those cases where the court has held that the uncertainty of the object has afforded evidence that no trust was intended. I agree with the Vice-Chancellor in interpreting 'views and wishes' to mean 'designs and desires.' And the very expression of confidence that Miss Penny would make a good use, and dispose of the property in a manner in accordance with the testatrix's designs, or desires, or intentions, appears to me to amount to a declaration that Miss Penny was to hold the property for that purpose, or in other words to the same import, upon trust. It seems to me to be tantamount to a bequest upon trust, and if so, that is sufficient to exclude Miss Penny from taking the beneficial interest. Such views and wishes may be left unexplained, but still in such case it is clear a trust was intended, and that is sufficient to exclude the legatee from the beneficial interest. Once establish that a trust was intended, and the legatee cannot take beneficially. If a testator gives upon trust, though he never adds a syllable to denote the objects of that trust, or though he declares the trust in such a way as not to exhaust the property, or though he declares it imperfectly, or though the trusts are illegal, still in all these cases the legatee is excluded and the next of kin take. But there is peculiar effect in the word 'trust.' Other expressions may be equally indicative of a fiduciary intent, though not

"Trust," a word of efficacy.

equally apt or clear. In this case, however, we are not left to spell out a trust from the residuary clause alone; the fact that besides a legacy of £3000, another legacy is expressly given to Miss Penny, 'in addition for the trouble she will have in acting as executrix,' clearly shows that she was not intended to take the residue beneficially; because if Miss Penny was to take the whole residue beneficially, as the testatrix must be presumed to have acted upon the belief which the fact warranted, that her estate was abundantly sufficient to satisfy all bequests, there could be no object in taking out of that residue, of which she was to have the whole, £3000 for her trouble; the fact of the legacy not only strongly confirms, but is only consistent with the hypothesis, that the whole residue was not to be taken beneficially. It cannot be referable to the trouble she would have in the execution of the bequests in the will itself or the proved codicils, for though the bequests are numerous, not one of them involves any amount of trouble; whereas the views and wishes of the testatrix to which she alluded, might be such that the carrying them into effect might involve the executrix in very difficult trusts."[1]

Powers in the nature of trusts.

Hitherto those cases arising upon words of recommendation have been considered by which a trust simply has been held to be created. There is, however, another class of cases where powers are given to persons accompanied with such words of recommendation in favour of certain objects as to render them powers in the nature of trusts; so that the failure of the donees to exercise such powers in favour of the objects will not turn to their prejudice, since the court will, to a certain extent, take upon itself the duties of the donees of the power.[2] It is perfectly clear that

[1] *Langley* v. *Thomas*, 6 De G. M. & G. 645; *Bernard* v. *Minshull*, Johns. 276.

[2] *Gude* v. *Worthington*, 3 De G. & Sm. 389; *Izod* v. *Izod*, 32 Beav. 242.

where there is a mere power of disposing, and that power is not executed, this court cannot execute it.[1] It is equally clear that wherever a trust is created, and the execution of that trust fails by the death of the trustee, or by accident, this court will execute the trust.[2] But there is not only a mere trust and a mere power, but there is also known to the court a power with which the party to whom it is given is entrusted, and required to execute; and with regard to that species of power, the court considers it as partaking so much of the nature and qualities of a trust, that if the person who has that duty imposed on him does not discharge it, the court will to a certain extent discharge the duty in his room and place.[3]

Court takes upon itself their execution.

In *Burrough* v. *Philcox*,[4] a testator directed that certain stock should stand in his name, and certain real estates remain unalienated "until the following contingencies are completed;" and after giving life interests in such stock and estates to his two children, with remainder to their issue, he declared that in case his two children should both die without leaving lawful issue, the same should be disposed of, as after mentioned; that is to say, the survivor of his two children should have power to dispose by his will, of his real and personal estate, "amongst my nephews and nieces or their children, either all to one of them, or to as many of them as my surviving child shall think proper." It was held by Lord Cottenham that a trust was created in favour of the testator's nephews and nieces and their children, subject to a power of selection and distribution in his surviving child. "When there appears," observes his Lordship, "a general intention in favour of a class and a particular intention in favour of individuals of a class to be selected

General intention in favour of a class carried out, if particular intention fail.

[1] *Brown* v. *Higgs*, 8 Ves. 570.
[2] *Ibid.*
[3] *Brown* v. *Higgs*, 8 Ves. 561, 5 My. & Cr. 92.
[4] 5 My. & Cr. 72.

by another person, and the particular intention fails, from that selection not being made, the court will carry into effect the general intention in favour of the class."

In *Salisbury* v. *Denton*,[1] a testator by will gave a fund to be at the disposal of his widow by her will, therewith to apply a part for charity, the remainder to be at her disposal among my "relations, in such proportions as she may be pleased to direct." The widow died without exercising the power of determining the proportions in which each were to take. Held that the bequest was not void for uncertainty, but that the court would divide the fund in moieties, and give one of such moieties to charitable purposes, and the other moiety to such of the testator's relatives as were capable of taking within the statutes of distribution.[2]

Liability of a purchaser to see to the application of purchase-money.

A *cestui que trust* is the peculiar favourite of courts of equity, and equity has sought by the most stringent rules to protect a *cestui que trust* against the *mala fides* or carelessness of his trustee. In furtherance of this object, the doctrine was early established in equity, that if a trustee for sale had to pay over the purchase-money to other persons in given shares, the purchaser was bound to see that the trustee applied the purchase-money accordingly, unless the instrument by which the trust was created contained a declaration that the trustee's receipt should be a good discharge. In the absence of such a declaration the trustee was considered as not to be trusted, and the purchaser, unless he looked after him, was himself responsible for the misapplication of the money. This rule bearing very hardly on purchasers, and mortgagees who are purchasers *pro tanto*, and being in the way

[1] 3 K. & J. 529.

[2] *Little* v. *Neil*, 10 W. R. 592; *Gough* v. *Bult*, 16 Sim. 45.

of that unfettered disposition of property which the law so much encourages, several legislative acts have been passed relieving a purchaser of the most onerous part of his liability. It will be sufficient, therefore, briefly to state the rules by which the purchaser's liability is regulated in cases not governed by the statutes.

Purchaser of personalty exonerated.

1. As it is a general rule at common law that personalty constitutes the natural and primary fund for the payment of the debts of the testator, the purchaser of the whole or any part of it was not bound to see that the purchase-money was applied by the executors in discharge of the debts.[1] But even in this case, if there be fraud on the part of the purchaser, he will not be exonerated, as where an executor disposes of his testator's assets in payment of a debt of his own.[2]

Trust or charge for payment of debts and legacies generally.

2. Where real estate is devised to trustees upon trust, to sell for payment of debts, or debts and legacies generally, or if the lands are merely *charged* with such payment, the purchaser is exonerated.[3]

Trust for payment of certain debts, or legacies only.

3. But if the trust directs lands to be sold for the payment of certain debts, mentioning in particular to whom those debts are owing, or if there is a trust for payment of legacies or annuities only, the purchaser is bound to see to the proper application of the purchase-money.[4]

Lord St Leonard's Act, 22 & 23 Vict., c. 35.

By stat. 22 & 23 Vict., c. 35, sec. 23, it is enacted that "the *bonâ fide* payment to, and the receipt of any person to whom any purchase or mortgage money shall be payable upon any express or implied trust, shall

[1] *Ewer* v. *Corbet*, 2 P. W. 149; *Keane* v. *Robarts*, 4 Mad. 356.
[2] *Hill* v. *Simpson*, 7 Ves. 152.
[3] *Elliot* v. *Merryman*, 1 L. C. 51; *Jebb* v. *Abbott*, cited Co. Litt. 290 *b.*; *Dowlin* v. *Hudson*, 17 Beav. 248.
[4] *Elliot* v. *Merryman*, 1 L. C. 51; *Johnson* v. *Kennett*, 3 My. & K. 630.

effectually discharge the person paying the same from seeing to the application, or being answerable for the misapplication thereof, unless the contrary shall be expressly declared by the instrument creating the trust or security."[1]

Lord Cranworth's Act, 23 & 24 Vict., c. 145.

By 23 & 24 Vict., c. 145, sec. 29, it is further enacted that "the receipts in writing of any *trustees* or *trustee* for any money payable to them or him by reason or in the exercise of any *trusts* or *powers* reposed or vested in them or him, shall be sufficient discharges for the money therein expressed to be received, and shall effectually exonerate the persons paying such money from seeing to the application thereof, or from being answerable for any loss or misapplication thereof."

Acts not retrospective.

The 23d section of Lord St Leonards' Act is considered to be not retrospective, and therefore to apply only to instruments executed since August 13, 1859, the date of the passing of the act. The operation of Lord Cranworth's Act is by section 34 expressly confined to instruments coming into operation after August 28th, 1860. The distinctions, therefore, which have been taken, as to the liability of purchasers to see to the application of their purchase-money, will still apply in all cases arising under deeds or wills executed before the respective dates of those acts.[2]

Distinction between a charge and a trust or power to raise money by sale.

With regard to the provisions of these statutes, it is necessary to bear in mind the difference between a charge of money on lands, and a trust or power to raise the same by sale. In the former case it was held that, though the owner of the lands was not a trustee, nor the owner of the money a *cestui que trust*, yet where lands so charged were sold, the purchaser

[1] *Bennett* v. *Lytton*, 2 J. & H. 158.

[2] Dart's V. & P. 4th ed. p. 546.

was no less obliged to see to the application of his purchase-money, than if he had bought under an express trust or power. The only exception to this rule was, as we have already seen, where there was a general charge of debts. Now, however, it appears that purchasers of land subject to a charge, are under the above-mentioned acts exonerated from liability, except in certain cases to be hereafter mentioned.

Devisees in trust subject to a charge may sell or mortgage without an express power.

By Lord St Leonard's Act, sec. 14, where, by a will coming into operation after the passing of the act, a testator charges his real estate with the payment of his debts, or any legacy or specific sum of money, and devises the estate so charged to any trustee or trustees for the whole of his interest, and does not make any express provision for the raising of such debts, legacy, or sums of money, the devisee or devisees in trust, notwithstanding any trusts actually declared by the testator, may raise the same either by actual sale or by mortgage; and this power is by the 15th section extended to all persons taking the estate by survivorship, descent or devise, or appointment under the will, or by the Court of Chancery. By the 16th section, where the estate subject to the charge is not devised to trustees for the testator's whole interest, the executor or executors have a similar power of raising the amount of the charge by sale or mortgage.

Exceptions.

By section 18, it is enacted that the provisions contained in sections 14, 15 and 16, shall not extend to a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest charged with debts or legacies, nor shall they affect the power of any such devisee or devisees to sell or mortgage as he or they may by law now do.

Since the change effected by this enactment, ques-

tions as to the power to give receipts, and liability to see to the application of the purchase-money, have for the future become of little practical importance. To quote the words of a learned writer, "in cases falling within the 14th and 16th sections of the act, the testator or the legislature on his behalf has created a fiduciary power. A charge in words has now become a trust in effect. The creditors have persons appointed to look after them; and the trustees and executors, when they agree to act under the will, undertake an express trust; and such a trust as, it is presumed, would enable them (even should legacies only be charged) to give an effectual receipt under the 29th section of the act 23 & 24 Vict., cap. 145."[1]

[1] Wms. Real Assets, p. 90; and see Dart's V. & P. 4th ed. p. 564.

CHAPTER III.

EXPRESS PUBLIC OR CHARITABLE TRUSTS.

Charities favoured by the law.

CHARITIES are so highly favoured in the law, that charitable gifts have generally received a more liberal construction than gifts to individuals.[1]

Charitable gifts construed differently from gifts to individuals.

Thus, if a testator gives his property to such person as he shall hereafter name to be his executor, and afterwards he appoints no executor, or if an estate is devised to such person as the executor shall name, and no executor is appointed; or, if an executor being appointed, he dies in the testator's lifetime and no other is appointed in his place, in all these cases, if the bequest be in favour of a charity, the Court of Chancery will assume the office of an executor, and carry into effect that bequest which in the case of individuals must have failed altogether.[2]

General intention effectuated.

Again, if the testator has expressed an absolute intention to give a legacy to charitable purposes, but he has left uncertain, or to some future act, the mode by which it is to be carried into effect, then the Court of Chancery, if no mode is pointed out, will of itself supply the defect, and enforce the charity.[3]

Doctrine of *cy-pres*.

Where the literal execution of the trusts of a charitable gift become inexpedient or impracticable, the court will execute them *cy-pres*, *i.e.*, as nearly as it can to the original purpose, so as to execute them,

[1] St. 1165.
[2] *Mills* v. *Farmer*, 1 Mer. 55.
96; *Moggridge* v. *Thackwell*, 7 Ves. 36; St. 1165-66.
[3] St. 1167.

although not in mode, yet in substance. The general principle upon which the court acts is thus laid down by Lord Eldon in the leading case of *Moggridge* v. *Thackwell*,[1] viz., "that if the testator has manifested a general intention to give to a charity, the failure of the particular mode in which the charity is to be effectuated shall not destroy the charity; but if the substantial intention is charity, the law will substitute another mode of devoting the property to charitable purposes, though the formal intention as to the mode cannot be accomplished." Thus, where there was a bequest of the residue of the testator's estate to a company to apply the interest of a moiety "unto the redemption of British slaves in Turkey and Barbary," one-fourth to charity schools in London and its suburbs, and one-fourth towards poor and destitute freemen of the company; there being no British slaves in Turkey and Barbary, the court directed a new scheme to be framed *cy-pres*, and approved of a scheme which gave the moiety thus undisposed of to the donees of the other fourth parts.[2]

Applies only where there is a general intention of charity.

The doctrine of *cy-pres*, it will be seen, is held to be only applicable where the testator has manifested in his will a general intention of charity, and therefore will not be applicable whenever such general intention is not to be found. If, therefore, it is clearly seen that the testator had but one particular object in his mind, as, for example, to build a church at W., and that purpose cannot be answered, the next of kin will take.[3]

Not where there is a specific object.

In further aid of charities, the court will supply all defects of conveyances, where the donor hath a capa-

Defects of conveyance supplied.

[1] 7 Ves. 69.

[2] *Att. Genl.* v. *The Ironmongers' Co.*, 2 Beav. 313; St. 1170 (*a*).

[3] St. 1182; *Clark* v. *Taylor*, 1 Drew. 642; *Loscombe* v. *Wintringham*, 13 Beav. 87; *Sinnet* v. *Herbert*, L. R. 12 Eq. 201.

city and a disposable estate, and his mode of donation does not contravene the provisions of any statute.[1]

Lapse of time no bar.

And to give another instance of the favour shown to charity, lapse of time in equity is no bar, in the case of charitable trusts, as it would in mere cases of private trusts. Thus, in the case of a charitable trust, where a corporation had purchased with notice of the trust, and had held the property under an adverse title for one hundred and fifty years, it was decided that the corporation should reconvey the property upon the original trusts.[2]

Assets not marshalled in favour of charities.

Although the general rule is that equity favours charities, there is one case where this rule has not been followed. Assets will not be marshalled by a court of equity in favour of a charity. Thus, if a testator give his real and personal estate (consisting of personalty savouring of realty, as leaseholds, and also, of pure personalty), to trustees, upon trust to sell and pay his debts and legacies, and bequeath the residue to a charity, equity will not marshal the assets by throwing the debts and ordinary legacies upon the proceeds of the real estate, and the personalty savouring of realty, in order to leave the pure personalty for the charity.[3] The rule of the court in such cases, is to appropriate the fund, as if no legal objection existed, as to applying any portion of it to the charity legacies: and then to hold such proportion of the charity legacies to fail, as would in that way fall to be paid out of the prohibited fund.[4]

Rule as to marshalling.

It is a well-established principle that if the bequest

[1] St. 1171; *Sayer* v. *Sayer*, 7 Hare, 377; *Innes* v. *Sayer*, 3 Mac. & G. 606.

[2] St. 1192 (*a*); *Att. Gen.* v. *Christ's Hospital*, 3 My. & Kee. 344.

[3] *Fourdrin* v. *Gowdey*, 3 My. & K. 397.

[4] *Williams* v. *Kershaw*, 1 Kee. 274 *n*; *Robinson* v. *Governors of the London Hospital*, 10 Hare, 19; Tudor's L. C. in Real Prop. 491.

If gift be for charity, equity will effectuate it at all events.

be for a charity, it matters not how uncertain the persons or the objects may be, or whether the persons who are to take are in *esse* or not, or whether the legatee be a corporation capable in law of taking or not, or whether the bequest can be carried into operation or not; for in all these, and like cases, the Court of Chancery will treat it as a valid charitable bequest, and will dispose of it for such charitable purposes as it shall think fit.[1] But where the bequest may, in conformity to the express words of the will, be disposed of in charity of a discretionary private nature, or be employed for any general, benevolent, or useful purposes, or for any general purpose, whether charitable or otherwise, or for charitable or other general purposes at discretion, the bequest will be void, as being too general and indefinite for the Court of Chancery to execute. Hence, if a man bequeaths a sum of money to such charitable uses as he shall direct, by codicil annexed to his will, or by note in writing, and he leaves no direction by note or writing, the Court of Chancery, applying the rule that the nomination of the particular objects is only the mode, and the gift to the charity the substance, of the testamentary disposition, will carry into effect the general intention of charity. Yet, if a testator make a bequest to trustees for such benevolent, religious, and charitable purposes, or for such charitable or public purposes, as they should in their discretion approve of, the legacy cannot be supported.[2]

But not if left to discretion of trustee for other than charitable purposes.

Resulting trusts in gifts to charities.

The following rules as to resulting trusts in gifts to charities are laid down in Lewin on Trustees.[3]

1. Where no object expressed, general intention carried out.

1. Where a person makes a valid gift, whether by deed or will, and expresses a general intention of

[1] St. 1169.

[2] *Morice* v. *Bishop of Durham*, 9 Ves. 399, 10 Ves. 522; *Ellis* v. *Selby*, 1 My. & Cr. 286.

[3] p. 130, 131.

charity, but either particularises no objects,[1] or such as do not exhaust the proceeds,[2] the court will not suffer the property, in the first case, or the surplus in the second, to result to the settlor or his representative, but will take upon itself to execute the general intention, by declaring the particular purposes to which the fund shall be applied.

2. Where a person settles lands, or the rents and profits of lands, to purposes which at the time exhaust the whole proceeds, but in consequence of an increase in the value of the estate, an excess of income subsequently arises, the court will order the surplus, instead of resulting, to be applied in the same or a similar manner with the original amount.[3]

2. Where rents increase, surplus applied to charitable purpose.

3. But even in the case of charity, if the settlor do not give the land, or the whole rents of the land, but noticing the property to be of a certain value, appropriates part only to the charity, the residue will then, according to the circumstances, either result to the heir-at-law,[4] or belong to the donee of the property, subject to the charge, if the latter be (as in the case of a charitable corporation) itself an object of charity.[5]

3. Exception from the foregoing rules.

[1] *Att.-Gen.* v. *Herrick*, Amb. 712.
[2] *Att.-Gen.* v. *Tonna*, 2 Ves. Jr. 1.
[3] *Thetford School Ca.* 8 Rep. 130 *b*; *Beverley* v. *Att.-Gen.* 6 H. L. Cas. 310; *Att.-Gen.* v. *Caius College*, 2 Kee. 150; *Att.-Gen.* v. *Marchant*, L. R. 3 Eq. 424.
[4] *Att.-Gen.* v. *Mayor of Bristol*, 2 J. & W. 308.
[5] *Beverley*, v. *Att.-Gen.* 6 H. L. Cas. 310; *Att.-Gen.* v. *Southmoulton*, 5 H. L. Cas. 1; *Att.-Gen.* v. *Trin. Coll. Camb.* 24 Beav. 383.

CHAPTER IV.

IMPLIED TRUSTS.

Implied trusts.

AN implied trust is a trust which is founded on an unexpressed but presumable intention of the party creating it. Of this class resulting trusts furnish an example.

1. Purchases in the name of strangers result to the purchaser.

1. "The clear result of all the cases, without a single exception, is, that the trust of a legal estate, whether freehold, copyhold, or leasehold, whether taken in the names of the purchaser and others, or in the names of others without that of the purchaser, whether in one name or several, whether jointly or *successivè*, results to the man who advances the purchase money; and it goes in strict analogy to the rule of common law, that where a feoffment is made without consideration, the use results to the feoffer."[1] To illustrate this statement of the doctrine, suppose A. advances the purchase-money of a freehold, copyhold, or leasehold estate, and a conveyance surrender or assignment of the legal interest in it is made either to B., or to B. and C., or A., B., and C. jointly, or to A., B., and C. successively; in all these cases a trust will result in favour of A.

Applicable to realty as well as personalty.

This doctrine is applicable to personal, as well as to real estate.[2]

The doctrine of resulting trusts is applicable also to cases where two or more persons advance the purchase-money jointly, but the purchase is taken in the name

[1] *Dyer* v. *Dyer*, 1 L. C. 184. [2] *Ebrand* v. *Dancer*, 2 Ch. Ca. 26.

of one of them; for there will be a resulting trust in favour of the other as to so much of the money as he has advanced.[1]

But no trust will result where the policy of an Act of Parliament would be thereby defeated.[2]

Parol evidence is admissible to show actual purchaser.

If the advance of the purchase-money by the real purchaser does not appear on the face of the deed, and even if it is stated to have been made by the nominal purchaser, parol evidence is admissible to prove by whom it was actually made.[3] It has been objected that the admission of such evidence would be contrary to the Statute of Frauds; but it will be seen that the trust which results to the person paying the purchase money and taking a conveyance in the name of another is a trust resulting by operation of law, and trusts of that nature are expressly excepted from the statute.[4]

Resulting trusts not within the Statute of Frauds.

Resulting trust may be rebutted by evidence of purchaser's intention.

Resulting trusts, however, as they arise from an equitable presumption, may be rebutted by parol evidence, showing it was the intention of the person who advanced the purchase-money that the person to whom the property was transferred should take for his own benefit.[5]

The presumption of advancement.

And where the purchaser is under a legal, or, in certain cases, a merely moral obligation to maintain the person in whose name the purchase is made, equity will raise a presumption that the purchase was intended as an advancement. Therefore as to purchases made in the name of children or of persons similarly favoured, it may be laid down as a general rule that

[1] *Wray* v. *Steele*, 2 V. & B. 388.
[2] *Ex parte Yallop*, 15 Ves. 68; *Groves* v. *Groves*, 3 Y. & J. 163, 175; *Childers* v. *Childers*, 1 De G. & Jo. 482.
[3] *Ryall* v. *Ryall*, 1 Atk. 59; *Lench* v. *Lench*, 10 Ves. 511, 517; *Bartlett* v. *Pickersgill*, 1 Eden. 515.
[4] 29 Car. II. c. 3, s. 8.
[5] *Deacon* v. *Colquhoun*, 2 Drew. 21; *Wheeler* v. *Smith*, 1 Giff. 300; *Lane* v. *Dighton*, Amb. 409.

there will *primâ facie* be no resulting trust for the purchaser, but, on the contrary, a presumption arises that an advancement was intended.

In whose favour it will be raised.

(*a.*) In whose favour this presumption will be raised.

1. Legitimate child.

1. In favour of a legitimate child.[1]

2. One to whom the purchaser has placed himself *in loco parentis*.

2. The presumption may also arise in favour of any person with regard to whom the person advancing the money has placed himself *in loco parentis;* thus, in *Beckford* v. *Beckford*,[2] an illegitimate son, in *Ebrand* v. *Dancer*,[3] a grandchild, whose father was dead,[4] and in *Currant* v. *Jago*,[5] the *nephew* of a wife, were held entitled to property purchased in their names, from the presumption of advancement being intended. But it has been held in a recent case that the mere fact that a person has placed himself *in loco parentis* towards the *illegitimate* child of his daughter did not alone raise a presumption of advancement in his favour. Wood, V. C., said,—"The court has never then held that any presumption of advancement arose merely from the fact of so distant a relationship (if it be a relationship) as this, nor yet *merely* from the fact that one of the parties was *in loco parentis* to the other. Here I am asked to conjoin both the doctrines, and out of the weak parts of both to make one strong chain, and hold that the testator was under the obligation of making provision for an illegitimate grandchild, whom he was not under any obligation, moral or legal, to support, and whose father was alive, merely on the ground that he had voluntarily brought up and educated him."[6]

[1] *Sidmouth* v. *Sidmouth*, 2 Beav. 447; *Dyer* v. *Dyer*, 2 Cox, 92.
[2] Lofft, 290.
[3] Ch. Ca. 26.
[4] See *Soar* v. *Foster*, 4 K. & J. 152.
[5] 1 Coll. C. Ca. 261.
[6] *Tucker* v. *Burrow*, 2 H. & M. 515; *Forrest* v. *Forrest*, 13 W. R. 380.

3. The presumption also arises in favour of a wife.[1] But it will not arise when the purchaser makes the purchase in the names of himself and a woman with whom he had gone through the mere form of marriage, as in the case of a marriage with a deceased wife's sister.[2] 3. Of a wife.

In *Drew* v. *Martin*,[3] a husband entered into an agreement for the purchase of land in the name of himself and his wife, and died before the whole of the purchase-money was paid. Held, that the purchase enured for the benefit of the widow, and that the unpaid purchase-money was payable out of the husband's personal estate.

In *Re De Visme*,[4] it was decided that where a married woman had, out of her separate property, made a purchase in the name of her children, no presumption of advancement arose; inasmuch as a married woman was under no obligation, as the law then stood, to maintain her children.[5] *Re De Visme.*

The presumption of advancement being an equitable presumption may be rebutted by parol evidence. "The advancement of a son is a mere question of intention, and, therefore, facts antecedent or contemporaneous with the purchase, or so immediately after it as to constitute a part of the same transaction, may properly be put in evidence for the purpose of rebutting the presumption."[6] In *Williams* v. *Williams*,[7] it was Rebuttable by parol evidence. Of contemporaneous acts or declarations.

[1] *Drew* v. *Martin*, 2 H. & M. 130; *Rider* v. *Kidder*, 10 Ves. 360.

[2] *Soar* v. *Foster*, 4 K. & J. 152.

[3] 2 H. & M. 130.

[4] 2 De G. Jo. & S. 17.

[5] By sect. 14 of the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), married women are made liable to maintain their children out of their separate property; and by sect. 13 a similar liability is created with respect to their husbands. It may therefore be a question, whether, for the future, the presumption of advancement may not arise, where the wife has made purchases in the name of her children or husband.

[6] Lewin on Trustees, 136; *Tumbridge* v. *Care*, 19 W. R. 1047; but see *Devoy* v. *Devoy*, 3 Sm. & Giff. 403.

[7] 32 Beav 370.

objected that a parol declaration by the father at the time that he intended the son to hold as trustee, amounted to the *creation* of a trust in his own favour, and was therefore by the Statute of Frauds rendered inadmissible. But this objection was thus answered: that "as the trust would result to the father, were it not rebutted by the sonship as a circumstance of evidence, the father may counteract that circumstance by the evidence arising from his parol declaration." [1]

A fortiori parol evidence may be given by the son to show the intention of the father to advance him; for such evidence is in support both of the legal interest of the son and of the equitable presumption.[2]

Subsequent declarations of father may be used against but not for him.

The acts and declarations of the father *subsequent* to the purchase may be used in evidence against him by the son, although they could not be used by the father against the son; [3] and the better opinion seems to be, that the subsequent acts and declarations of the son can be used against him by the father, where there is nothing showing the intention of the father at the time of the purchase sufficient to counteract the effect of those declarations.[4]

Presumption not rebutted by receipt of rents by father.

The presumption of advancement will not be rebutted by the mere circumstance that the father retains the property under his control, or that he receives the rents and profits, or interest, even though the son were no longer an infant.[5]

A very common case of resulting trusts arises where

[1] *Lewin on Trustees*, 144.
[2] *Lamplugh* v. *Lamplugh*, 1 P. Wms. 113.
[3] *Reddington* v. *Reddington*, 3 Ridg. P. C. 195, 197.
[4] *Sidmouth* v. *Sidmouth* 2 Beav. 455; *Scawin* v. *Scawin*, 1 Y. & C. C. C. 65.
[5] *Sidmouth* v. *Sidmouth*, 2 Beav. 447; *Grey* v. *Grey*, 2 Swanst. 594; *Williams* v. *Williams*, 32 Beav. 370; *Bone* v. *Pollard*, 24 Beav. 283.

a settlor conveys property on trusts which do not exhaust the whole property; in that case, as to so much of the property respecting which no trust is declared, there will be a resulting trust in favour of the settlor.[1]

Where trusts do not exhaust the whole, the residue results.

It is a leading rule with regard to resulting trusts, that where property is given simply upon trust, that the trustee is excluded by that fact from taking beneficially, in case of failure of the whole or part of the purpose for which the trust was directed.[2] Thus, in *King* v. *Denison*,[3] in exemplifying the difference between a gift on trust and a gift vesting the beneficial interest in the donee; the judgment says, "If I give to A. and his heirs all my real estate charged with my debts, that is a devise to him for a particular purpose, but not for that purpose alone. If the devise is on trust to pay my debts, that is a devise for a particular purpose, and nothing more; and the effect of these two modes admits just this difference; the former is a devise of an estate for the purpose of giving the devisee the beneficial interest; subject to a particular purpose; the latter is a devise for a particular purpose with no intention to give him any beneficial interest; where, therefore, the whole legal interest is given for the purpose of satisfying trusts expressed, and those trusts do not in their execution exhaust the whole, so much of the beneficial interest as is not exhausted belongs to the heir; but where the whole legal interest is given for a particular purpose, with an intention to give to the donee of the legal estate the beneficial interest, if the whole is not exhausted by the particular purpose, the surplus goes to the devisee, as it is intended to be given to him."

Trustee cannot generally take beneficially.

Devise with a charge devisee takes beneficially.

Devise on trust, devisee a trustee.

But suppose that a trust of property having been

[1] *Parnell* v. *Hingston*, 3 Sm. & Giff. 344.

[2] 2 Sp. 225, 226.

[3] 1 Ves. & Bea. 272.

Death of settlor, or *cestui que trust* intestate and without representatives.

created does not exhaust the whole of it, and there is no one in whose favour the trust can result, *i.e.*, that as to realty the owner dies intestate and without heirs, and as to personalty he dies intestate and without personal representatives—who takes the property in each of these cases, the crown or the trustee?

As to realty.

As to realty, in *Burgess* v. *Wheate*,[1] A. being seised in fee *ex parte paternâ*, conveyed real estate to trustees, in trust for herself, her heirs, and assigns, to the intent that she should appoint, and for no other use whatsoever. A. died without having made an appointment, and without any heirs *ex parte paternâ*; it was held that the maternal heir was not entitled, and that there being a terre-tenant, the holder of the legal estate, the crown claiming by *escheat* had no right to a conveyance of the land, and that the trustees, therefore, took beneficially. On the same principle, where a mortgage *in fee* is made, and the mortgagor dies intestate and without heirs, the equity of redemption does not escheat, but belongs to the mortgagee, subject to the mortgagor's debts.[2]

No *escheat* of trust-estate, but trustee takes beneficially.

As to personalty, the crown takes as *bona vacantia*.

As to personalty, the rule is very different. Under the circumstances stated, the crown, by virtue of its prerogative, may claim it as *bona vacantia*.[3]

Executors took undisposed-of residue before 1 Will. IV., c. 40.

Except where excluded by testator's intention, ex press or implied.

Before the statute 1 Will. IV., c. 40, where a testator made no express disposition of the residue of his personal estate, the executors were at law entitled to such residue; and courts of equity so far followed the law as to hold the executors to be entitled to retain such residue for their own use, unless it appeared to have been the testator's intention to exclude them from the beneficial interest therein. In that case, they

[1] 1 Eden. 177.
[2] *Beale* v. *Symonds*, 16 Beav. 406.
[3] *Taylor* v. *Haygarth*, 14 Sim. 8; *Middleton* v. *Spicer*, 1 Br. C. C. 201.

were held to be trustees for the person or persons who would have been entitled to such estate under the statute of distributions, if the testator had died intestate. And equity laid hold of any circumstance or expression in the will, which might appear to rebut the presumption of a gift to the executors, and convert them into trustees. Thus the intention to exclude the executors from taking beneficially, was inferred from an express legacy being given to the executor, or where *equal* legacies were given to the executors, if more than one, but not if *unequal* legacies were given them.[1]

Executors now trustees for representatives of deceased.

The statute, furthering the views of the courts of equity, enacts that as to wills made after the 1st Sept. 1830, the executors shall be deemed by courts of equity to be trustees for the persons (if any) who would be entitled, under the statute of distributions, in respect of any residue not expressly disposed of, unless it should appear by the will that the executors were intended to take such residue beneficially. Whereas before the statute, the presumption was in favour of the executors; after the statute, the onus has been shifted on them, of proving that the testator intended them to take beneficially.[2]

Resulting trusts under the doctrine of conversion.

As to resulting trusts arising under the operation of the doctrine of conversion, the student is referred to the chapter on that doctrine, where the subject is fully discussed.[3]

Joint-tenancy at law.

Limitations which confer an estate in joint-tenancy at law, have the same effect in equity, when there are no circumstances which afford grounds for departure from the rule of law; so that where two or more per-

[1] *Lynn* v. *Beaver*, Turn. & Russ. 63; *Blinkhorn* v. *Feast*, 2 Ves. Sr. 26.

[2] *Harrison* v. *Harrison*, 2 H. & M. 237.

[3] p. 143.

sons purchase lands, and advance the money in *equal* shares, and take a conveyance to themselves and their heirs, they will be joint-tenants, and upon the death of one of them the estate will go to the survivor.[1]

Equity leans against survivorship in joint-tenancy.

But equity, acting on the broad principle that equality is equity, leans strongly against joint-tenancy, with the inseparable right of survivorship; for though it is true that each joint-tenant may have an equal chance of being the survivor, and thus taking the whole, yet this is but an equality in point of chance: as soon as one dies there is an end to the equality between them; on that event the whole accrues to the survivor. And the equal certainty of having an absolute equal share, or a share proportionate to the amount of the purchase-money advanced, is considered the far higher and truer equity than an equal chance of having the whole or none of the property purchased.[2] Joint-tenancy not being favoured in equity, courts of equity will lay hold of any circumstances from which it can reasonably be implied that a tenancy in common was intended, and will treat the surviving joint-purchaser as a trustee for the legal representatives of the deceased purchaser. Thus:—

Slight circumstances defeat survivorship.

1. Advance of purchase-money unequally.

1. Where two or more persons purchase lands and advance the purchase-money in *unequal* proportions, and this appears on the deed itself, this makes them in the nature of partners; the survivor will be deemed in equity a trustee for the other, in proportion to the sums advanced by him.[3]

2. Joint-mortgage.

2. Where money is advanced either in *equal* or *unequal* shares, by persons who take a mortgage to themselves jointly, in equity there will be a tenancy in common.[4]

[1] Litt. s. 280.
[2] *Rigden* v. *Vallier*, 2 Ves. 258.
[3] *Lake* v. *Gibson*, 1 L. C. 160.
[4] *Morley* v. *Bird*, 3 Ves. 631; *Robinson* v. *Preston*, 4 K. & J. 505.

3. The same rule is uniformly applied to joint purchases in the way of trade, and for purposes of partnership, and for other commercial transactions, by analogy to, and in expansion and furtherance of the great maxim of the common law:—*Jus accrescendi inter mercatores pro beneficio commercii locum non habet.*[1] 3. No survivorship in commercial purchases.

Where, however, land is not purchased but is devised, to two persons as joint-tenants, who make use of it for partnership purposes, they will not be held tenants in common in equity, unless they expressly agree so to hold, or unless it can be inferred from their mode of dealing with the property for a long period of time.[2] It is settled, also, that "all property, whatever might be its nature, purchased with partnership capital, for the purposes of the partnership trade," will, in the absence of any express agreement to the contrary, be deemed to be converted into personalty.[3] Land devised in joint-tenancy. Property purchased with partnership capital.

[1] *Lake* v. *Gibson*, 1 L. C. 160, St. 1207; *Jefferey*s v. *Small*, 1 Vern. 217.

[2] *Jackson* v. *Jackson*, 9 Ves. 591; *Morris* v. *Barrett*, 3 You. & J. 384.

[3] *Phillips* v. *Phillips*, 1 My. & K. 649; *Morris* v. *Barrett*, 3 You. & J. 384; *Forbes* v. *Steven*, L. R. 10 Eq. 178; *Wylie* v. *Wylie*, 4 Gr. 278.

CHAPTER V.

CONSTRUCTIVE TRUSTS.

A CONSTRUCTIVE trust, as distinguished both from express and implied trusts, may be defined to be a trust which is raised by construction of equity, in order to satisfy the demands of justice and good conscience without reference to any presumable intention of parties.

Equitable liens.

The doctrine of constructive trusts receives its most frequent illustrations in cases of what have been termed "equitable liens." A lien is not, strictly speaking, either a *jus in re*, or a *jus ad rem;* that is, it is not a property in the thing itself, nor does it constitute a right of action for the thing. It more properly constitutes a charge upon the thing.[1]

Vendor's lien for unpaid purchase-money.

"Where the vendor conveys, without more, though the consideration is upon the face of the instrument expressed to be paid, and by a receipt endorsed upon it, if it is the simple case of a conveyance, the money, or part of it not being paid, as between the vendor and vendee, and persons claiming as volunteers, upon the doctrine of this court . . . . though, perhaps, no actual contract has taken place, a lien shall prevail, in the one case, for the whole consideration; in the other, for that part of the money which was not paid."[2]

Waiver or abandonment.

As to what amounts to a waiver or abandonment of the lien, the general rule is this,—that the abandon-

[1] St. 1215.

[2] Per Lord Eldon in *Mackreth* v. *Symmons*, 1 L. C. 269.

ment by the vendor of his lien "is to depend, not upon the circumstance of taking a security, but upon the nature of the security as amounting to evidence, as it is sometimes called, or to declaration plain, or manifest intention, ... of a purpose to rely not any longer upon the estate, but upon the personal credit of the individual."[1] Lien not lost by taking a collateral security *per se*.

It is now settled that a mere personal security for the purchase-money as a bond,[2] or a bill, or a promissory-note,[3] will not *per se* evidence an intention on the part of the vendor to waive his lien over the estate. Bond.

Although the mere giving of a bond, bill, promissory-note, or covenant for the purchase-money, or the granting of an annuity, secured by bond or covenant,[4] will not be sufficient to discharge the equitable lien, yet where it appears that the note, bond, covenant, or annuity was *substituted* for the consideration-money, and was, in fact, the thing bargained for, the lien will be lost.[5] Thus, in *Buckland* v. *Pocknell*,[6] where A. agreed to sell an estate to B. for an annuity of £200, to be paid to him for life, and an annuity of £92, to be paid after his decease to his son, and B. was to pay off a mortgage to which the estate was subject. Accordingly B. executed a deed, by which he granted the annuities to A. and his son, and covenanted to pay them; and by a conveyance of even date, but executed after the annuity deed, after reciting the annuity deed, A. and the mortgagee, in pursuance of the agreement, and in consideration of the premises and of the annuities having been so granted, as thereinbefore recited, and of the payment of the mortgage-money, conveyed the estate to B. Upon the death of A., his True rule.

[1] *Mackreth* v. *Symmons*, 1 L. C. 273.
[2] *Collins* v. *Collins*, 31 Beav. 346.
[3] *Hughes* v. *Kearney*, 1 Sch. & Lefr. 134.
[4] *Clarke* v. *Royle*, 3 Sim. 499.
[5] 1 L. C. 290.
[6] 13 Sim. 406.

son's annuity, which had been assigned to the plaintiff, became in arrear. The Vice-Chancellor held that there was no lien for the annuity. "The question," observed his Honour, "is whether it does not appear on the face of the deed that the party who contracted to sell the land has got *that which he contracted to have.* Adverting to the mode in which the conveyances are made, my opinion is, that it would be quite wrong, because it would be contrary to what appears to have been the agreement of the parties, to hold that after the deeds were executed any lien remained for the annuities. As there was a separate instrument, which was executed first, which contained a distinct grant of the two annuities, and covenants for payment of them; and as the conveyance was made expressly in consideration of that deed; and as it was part of the express stipulation that the mortgage-money should be paid off, and, consequently, that the mortgagee should convey his legal estate to the purchaser, it would be quite inconsistent with the mode in which the parties have dealt to say, that there is an ulterior latent equity for the purpose of securing the annuity in a manner in which neither party ever thought that it was to be secured; and it is evident that they did not think that it was to be so secured, from their having taken a specific security for it. In the case of *Parrot* v. *Sweetland*,[1] which came before me and Mr Justice Bosanquet, when we had the honour of being Commissioners of the Great Seal, we affirmed the judgment of Sir J. Leach in a case where the cause of the transaction showed that the party had got that for which he bargained."[2]

When the vendor has a lien against the vendee for unpaid purchase-money, it binds the estate in the hands of—

[1] 3 My. & K. 655.
[2] *Dixon* v. *Gayfere*, 21 Beav. 118; *Dyke* v. *Rendall*, 2 De G. & M. & G. 209.

1. The purchaser and his heirs, and persons taking under them as volunteers.[1] Against whom the lien may be enforced.

2. Purchasers for valuable consideration, who bought with notice of the purchase-money remaining unpaid;[2] for *Qui prior est tempore, potior est jure.*

3. The assignees of a bankrupt, although they may have had no notice of it; for the assignees in bankruptcy take subject to all the equities attaching to the bankrupt.[3]

4. Where a vendee has sold the estate to a *bonâ fide* purchaser without notice, if the purchase-money has not been paid, the original vendor may proceed against the estate for his lien, or against the purchase-money in the hands of such purchaser for satisfaction; for, in such a case, the latter, not having paid his money, takes the estate *cum onere*, at least to the extent of the unpaid purchase-money. And this proceeds upon a general ground, that where trust money can be traced, it shall be applied to the purposes of the trust.[4]

5. If the legal estate be outstanding, then as the second purchaser for value without notice has only an equitable interest, he will be postponed to the equitable lien, which comes earlier in date; but the lien will not prevail against a *bonâ fide* purchaser for valuable consideration without notice, who has the legal estate in him,[5] for where the equities are equal the law shall prevail. Where the legal estate is outstanding.

And the first vendor may lose his lien through his

[1] *Mackreth* v. *Symmons*, 1 L. C. 263.
[2] *Walker* v. *Preswick*, 2 Ves. 622; *Hughes* v. *Kearney*, 1 Sch. & Lefr. 135; *Morris* v. *Chambers*, 29 Beav. 246.
[3] *Ex parte Hanson*, 12 Ves. 349; *Fawell* v. *Heelis*, Amb. 724.
[4] St. 1232, *Lench* v. *Lench*, 10 Ves. 511.
[5] *Cator* v. *Pembroke*, 1 Bro. C. C. 302.

Vendor may lose his lien by negligence. *Rice* v. *Rice.*

own negligence. Thus in *Rice* v. *Rice*,[1] certain leaseholds were assigned to a purchaser by a deed, which recited the payment of the whole purchase-money, and had the usual receipt endorsed on it; the title-deeds were delivered up to the purchaser. Some of the vendors received no part of their share of the purchase-money, having allowed the payment to stand over for a few days, on the promise of the purchaser then to pay. The day after the execution of the deeds, the purchaser deposited the assignment and title-deeds with the defendants, with a memorandum of deposit to secure an advance, and then absconded without paying either the vendors or the equitable mortgagees. It was held that the defendants, the equitable mortgagees having the better equity, were entitled to payment out of the estate in priority to the claim of the vendors for their lien, on the following grounds:— That though as equitable interests they were of equal worth in their abstract nature and quality, and would have been paid according to their order in point of time, still that the vendors had lost their priority by their own negligence; that "the vendors when they sold the estate chose to leave part of the purchase-money unpaid, and yet executed and delivered to the purchaser a conveyance by which they declared, in the most deliberate and solemn manner, both in the body and by a receipt endorsed, that the whole purchase-money had been paid; that they might have required that the title-deeds should remain in their custody, with a memorandum, by way of equitable mortgage, as a security for the unpaid purchase-money; that they voluntarily armed the purchaser with the means of dealing with the estate as the absolute legal and equitable owner, free from every shadow of encumbrance or adverse equity; that the defendant, who afterwards took a mortgage, was in effect invited and encouraged by the vendors to rely on the purchaser's

[1] 2 Drew. 73.

title; and that they had in effect by their acts assured the mortgagee that as far as they (the vendors) were concerned, the mortgagor had an indefeasible title both at law and in equity."[1]

Vendee's lien for prematurely paid purchase-money.

Corresponding to the lien of the vendor is the right of the vendee, who has paid the whole or part of his purchase-money prematurely, before a conveyance to have a lien upon the estate in the hands of the vendor;[2] and this lien will exist not only as against the vendor, but also as against a subsequent mortgagee who had notice of the payments having been made.[3]

Renewal of lease by trustee in his own name.

A common instance of a constructive trust arises in the renewal of leases; the invariable rule being that a lease renewed by a trustee or executor in his own name, even in the absence of fraud, and upon the refusal of the lessor to grant a new lease to the *cestui que trust*, shall be held upon trust for the person entitled to the old lease.[4] And this rule is applicable to persons having a limited interest in a renewable lease, as a tenant for life; if he renews it in his own name he will be held a trustee for those entitled in remainder.[5] And the reason of this rule is obvious, that it is but fair, if a tenant for life, acting upon the goodwill that accompanies the possession, gets a more durable term, that he should hold it for the benefit of those in remainder.[6] So likewise, if a partner renew a lease of the partnership premises on his own account, he will, as a general rule, be held a trustee of it for the firm.[7]

[1] *Wilson* v. *Keating*, 4 De G. & Jo. 588.
[2] *Wythes* v. *Lee*, 3 Drew. 396. *Turner* v. *Marriott*, L. R. 3 Eq. 744.
[3] *Watson* v. *Rose*, 10 W. R. 745, 10 Ho. L. Ca. 672.
[4] *Keech* v. *Sandford*, 1 L. C. 39.
[5] *Mill* v. *Hill*, 3 H. L. Cas. 828; *Yem* v. *Edwards*, 1 De G. & Jo. 598.
[6] *James* v. *Dean*, 15 Ves. 236.
[7] *Featherstonhaugh* v. *Fenwick*, 17 Ves. 311; *Clegg* v. *Fishwick*, 1 Mac. & G. 294.

Trustee has a lien on trust-fund for expenses of renewal.

A trustee or executor who has renewed a lease has a lien upon the estate for the costs and expenses of the renewal with interest.[1]

What improvements allowed for.

A constructive trust may arise where a person who is only joint-owner, acting *bonâ fide* permanently benefits an estate by repairs or improvements; for a lien or trust may arise in his favour in respect of the sum he has expended in such repairs or improvements.[2] Thus it was intimated in *Neesom* v. *Clarkson*,[3] that although a person expending money by mistake upon the property of another has no equity against the owner who was ignorant of and did not encourage him in his expenditure,[4] yet if it were necessary for the true owner to proceed in equity he would only be entitled to its assistance, according to the ordinary rule, by doing equity and making compensation for the expenditure. But a person will have no equity who lays out money on the property of another with full knowledge of the state of the title.[5]

He who seeks equity must do equity.

Improvements by tenant for life.

So again, where a tenant for life, under a will, has gone on to finish permanently beneficial improvements to an estate, which had been begun by the testator, courts of equity have deemed the expenditure a charge for which the tenant is entitled to a lien.[6] Thus, in *Dent* v. *Dent*[7] a tenant for life had expended on the estate large sums,—1. In completing a mansion house, left unfinished by the testatrix; 2. In erecting a conservatory and vinery; 3. In rebuilding farmhouses, &c.; 4. In erecting cottages; 5. In erecting permanent furnaces, works, buildings, &c., at some copper works; 6. In draining marshy

[1] *Holt* v. *Holt*, 1 Ch. Ca. 190; *Coppin* v. *Ferneyhough*, 2 B. C. C. 291.

[2] *Lake* v. *Gibson*, 1 L. C. 160.

[3] 4 Hare 97.

[4] *Nicholson* v. *Hooper*, 4 My. & Cr. 186.

[5] *Rennie* v. *Young*, 2 De G. & Jo. 136; *Ramsden* v. *Dyson*, L. R. 1 H. L. 129.

[6] *Hibbert* v. *Cooke*, 1 Sim. & Stu. 552.

[7] 30 Beav. 363.

ground; and 7. In making payments to keep a foreign mine working so as to prevent its forfeiture; —it was held that he was entitled to no allowance for these sums out of the personal estate of the testatrix, held upon similar trusts, or to any inquiry respecting them, excepting those laid out in completing the mansion, and for the foreign mine; as to which an inquiry was directed, whether the outlay was for the benefit of the inheritance.[1]

Heir of mortgagee trustee for personal representatives.

When a person has a mortgage in fee which he has not foreclosed, the legal estate in the mortgaged premises descends to his heir; but in equity the mortgaged estate, being only a security for money, the heir will be held a trustee for the personal representatives, and through them for the persons entitled to the personal estate of the mortgagee.[2]

In concluding the subject of trusts, express, implied, or constructive, it is necessary to remind the reader that the cases and instances given in the preceding pages, as coming under the head of trusts have been selected as most peculiarly and directly illustrative of that subject, and are by no means to be considered as exhaustive. It may almost be said that the whole science of equity jurisprudence is co-extensive, and conterminous, with the doctrine of trusts, at least, it is certain that there are few heads of equitable jurisdiction, which cannot, with greater or less propriety, be regarded as illustrative or explanatory of the rights, duties, and liabilities arising out of the fiduciary relation.

[1] *Dunne* v. *Dunne*, 3 Sm. & Giff. 22. *In re Leigh's Estate*, L. R. 6 ch. 887.

[2] *Thornborough* v. *Baker*, 2 L. C. 935.

CHAPTER VI.

TRUSTEES AND OTHERS STANDING IN A FIDUCIARY RELATION.

Who may be trustees.

In general terms, a trustee should be a person capable of taking and holding the legal estate, and possessed of natural capacity and legal ability to execute the trust, and domiciled within the jurisdiction of a court of equity.[1] A corporation as to lands,[2] a feme covert,[3] and an infant,[4] as to both real and personal estate, are, on account of their several disabilities, unsuited to hold the office of trustee. Since the Naturalisation Act 1870,[5] an alien is apparently equally capable of acting as trustee as a native born.

Equity never wants a trustee.

It is a general rule in courts of equity, that wherever a trust exists, either by the declaration of the party, or by intendment or implication of law, and the party creating the trust has not appointed any trustee to execute it, equity will follow the legal estate, and decree the person in whom it is vested (not being a *bonâ fide* purchaser for valuable consideration without notice, or otherwise entitled to protection[6]), to execute the trust. For it is a rule in equity which admits of no exception, that a court of equity never wants a trustee. And this rule is ap-

[1] Lewin on Trusts, 27.
[2] Ibid. 28, 29.
[3] *Lake* v. *De Lambert*, 4 Ves. 595.
[4] *Hearle* v. *Greenbank*, 3 Atk. 712.
[5] 33 & 34 Vict., c. 14, s. 2; as to old law see Gilb. on Uses, 43. *Fish* v. *Klein*, 2 Mer. 431.
[6] *Thorndike* v. *Hunt*, 3 De G. & J. 563; *Salsbury* v. *Bagott*, 2 Swanst. 608.

plied where property has been bequeathed in trust, without the appointment of a trustee; if it is personal estate, the personal representative is deemed the trustee; and if real estate, the heir or devisee is deemed the trustee, and is bound to its due execution.[1] The lapse of the legal estate never has the least influence upon the trusts to which it is subject; if the individuals named as trustees fail either by death or by being under disability, or by refusing to act, the court will provide a trustee; if no trustees are appointed at all, the Court of Chancery assumes the office in the first instance; if the trust cannot be executed through the medium which was in the primary view of the testator, it must be executed through the medium of the Court of Chancery. Therefore, the trustee is in fact a mere machine, and for whom he shall be trustee depends entirely upon the will of his *cestui que trust*, whether he was such in the original creation of the trust, or has become such by devolution or transfer,[2] and on the death of one trustee, the joint office survives.[3]

Trustee may be compelled to any act of duty.

The *cestui que trust* is entitled to file a bill against his trustee, and compel him to the execution of any particular act of duty, and a fund in the hands of trustees may be bound by any act or assignment by the *cestui que trust* who is *sui juris* without the consent of the trustees.[4]

Power and estate of *cestui que trust*.

If the *cestui que trust* has reason to suppose, and can satisfy the court that the trustee is about to proceed to an act not authorised by the true scope of the trust, he may obtain an injunction from the court to restrain the trustee from such a wanton exercise of his legal power.[5]

Trustee cannot renounce after acceptance.

A trustee who has accepted the trust cannot afterwards renounce it. The only mode in which he can obtain a release is

[1] St. 976.
[2] 2 Sp. 876; *Att.-Gen.* v. *Downing*, Wilm. R. 23.
[3] *Att.-Gen.* v. *Gleg*, 1 Atk. 356.
[4] *Donaldson* v. *Donaldson*, Kay, 711.
[5] *Balls* v. *Strutt*, 1 Hare, 146; Lewin on Tr. 613.

either under the sanction of a court of equity, or by virtue of a special power in the instrument creating the trust, or with the consent of all parties interested in the estate, being *sui juris*.[1]

Trustee cannot delegate his office.

The office of trustee being one of personal confidence cannot be delegated. Trustees, who take on themselves the management of property for the benefit of others, have no right to shift their duty on other persons, and if they do so, they remain subject to responsibility towards their *cestui que trust* for whom they have undertaken the duty.[2]

Delegation permitted where there is a moral necessity for it.

But trustees and executors may justify their administration of the trust fund by the instrumentality of others, where there exists a moral necessity for it. Necessity, which includes the *regular course of business*, will exonerate. Thus, if "an executor living in London, is to pay debts in Suffolk, and remits money to his co-executor to pay those debts, he is considered to do this of *necessity*, he could not transact business without trusting some person, and it would be impossible for him to discharge his duty, if he is made responsible when he remitted money to a person to whom he would have himself given credit, and would, in his own business have remitted money in the same way."[3]

The care and diligence required of trustees or executors.

Trustees or executors are bound to take the same care of trust property, as a man of ordinary caution would take of his own; and if they have done so, they will not be liable for any accidental loss; as for instance, by a robbery of the property while in

[1] *Manson* v. *Baillie*, 2 Macq. H. L. Cas. 80; Lewin on Tr. 204.

[2] *Turner* v. *Corney*, 5 Beav. 517; *Bostock* v. *Floyer*, 1 L. R. Ch. 26; *Eaves* v. *Hickson*, 30 Beav. 136.

[3] *Joy* v. *Campbell*, 1 Sch. & Lef. 341; *Clough* v. *Bond*, 3 My. & Cr. 497; *Ex parte Belchier* Amb. 219.

their own possession,[1] or by a robbery or loss, whilst in the possession of others with whom it has necessarily, *i.e.*, in the ordinary course of business, been intrusted.[2]

But if a trustee or executor permit the trust fund to remain unnecessarily in the hands of third parties, as, for instance, if money be left in the hands of a banker more than a year after the testator's death, and after the debts, &c., have been paid;[3] or if he mix trust property with his own,[4] or parts with his exclusive control over the fund, by associating with himself the authority of another person;[5] or if the fund be left to the entire control of a co-trustee,[6] it will be at his risk.[7]

No remuneration allowed to trustee.

It is an established rule that trustees, executors, or administrators, or others standing in a similar situation, shall have no allowance for their care and trouble, and this proceeds upon the well-known principle of equity, that a trustee shall not profit by his trust.[8] So strict is this rule, that although a trustee or executor may, by the direction of the author of the trusts, have carried on a trade or business at a great sacrifice of time, he will be allowed nothing as compensation for his personal trouble or loss of time.[9] And a solicitor, who is a trustee, is not entitled to charge for business done by him in relation to the trust, except for his costs out of pocket only, unless there is a provision in the instrument creating the trust, enabling him to receive remuneration for the

Solicitor trustee allowed only for costs out of pocket.

[1] *Morley* v. *Morley*, 2 Ch. Ca. 2.
[2] *Jones* v. *Lewis*, 2 Ves. 240; *Swinfen* v. *Swinfen*, 29 Beav. 211.
[3] *Darke* v. *Martyn*, 1 Beav. 525.
[4] *Lupton* v. *White*, 15 Ves. 432.
[5] *Salway* v. *Salway*, 2 Russ. & My. 215.
[6] *Clough* v. *Bond*, 3 My. & Cr. 490.
[7] *Castle* v. *Warland*, 32 Beav. 660; *Lunham* v. *Blundell*, 27 L. J. (N. S.) Ch. 179; *Matthews* v. *Brise*, 6 Beav. 239; Stat. 22 & 23 Vict. c. 35, s. 31.
[8] *Robinson* v. *Pett*, 2 L. C. 219; *Hamilton* v. *Wright*, 9 Cl. & F. 111.
[9] *Brocksopp* v. *Barnes*, 5 Madd. 90.

transaction of such business,[1] and even where a solicitor is appointed executor, and is to be "at liberty to charge for professional services, he can only charge for services strictly professional, and not for matters which an executor ought to have done without the intervention of a solicitor, such as for attendances to pay premiums on policies, or attending at the bank to make transfers," &c.[2]

Trustees may stipulate to receive compensation.

Although trustees or executors will not in general be entitled to any allowance for their trouble, there is nothing to prevent them contracting with their *cestui que trust*, to receive some compensation for the performance of the duties of the trust. But such a contract would be very jealously scrutinized by a court of equity, and if there be any appearance of unfairness, or unconscionable advantage on the part of the trustee, the agreement will not be enforced.[3]

Trustee must not make any advantage out of his trust.

In further illustration of the maxim that a trustee shall not make a profit by his trust may be mentioned those cases where one, in a fiduciary position, uses that position as a means of obtaining any profit or advantage which he would not otherwise obtain. It was upon this principle that Lord Eldon once directed an inquiry whether the liberty of sporting over the trust estate could be let for the benefit of the *cestui que trust*, and if not, he thought the game should belong to the heir; the trustee might appoint a gamekeeper, if necessary for the preservation of the game, but not to keep up a mere establishment of pleasure.[4]

If trustees or executors buy up any debt or encumbrance to which the trust estate is liable, for a less

[1] *Broughton* v. *Broughton*, 5 De G. M. & G. 160.
[2] *Harbin* v. *Darby*, 28 Beav. 325.
[3] *Ayliffe* v. *Murray*, 2 Atk. 58.
[4] *Webb* v. *Earl of Shaftesbury*, 7 Ves. 480–488.

sum than is actually due thereon, they will not be allowed to take the benefit to themselves, but the creditors or legatees, or other *cestui que trust* shall have the advantage of it.[1]

Trustee buying up debts for himself can charge only what he gave.

Again, if a trustee or executor use the fund committed to his care in buying and selling land, or in stock speculations, or lay out the trust-money in a commercial adventure, as in fitting out a vessel for a voyage, or if he employ it in business, in all these cases, while the executor or trustee is liable for all losses, the *cestui que trust* may insist either on having the trust fund replaced with interest, or on having the profits made by the trust funds so employed.[2]

Trustee trading with trust-estate must account for profits.

So, likewise, a person standing in a fiduciary relation towards another, will not be allowed to benefit by his trust, by obtaining a renewal of a lease in his own name, but will be deemed in equity to be a trustee for those interested in the original term,[3] nor will a trustee, as a general rule, be permitted to purchase the trust estate from his *cestui que trust.*[4]

Cannot renew lease in his own name.

Or purchase trust-estate.

The foregoing principles apply to agents,[5] guardians,[6] partners,[7] directors of companies,[8] and generally, to all persons clothed with a fiduciary character.[9]

Same principles apply to agents, &c.

If, however, a person does not expressly fill any fiduciary character, as that of trustee or executor, but is merely a constructive trustee, from having employed the money of another in a trade or business,

Constructive trustee.

[1] *Pooley* v. *Quilter*, 4 Drew, 184, 2 De G. & Jo. 327; *Fosbrooke* v. *Balguy*, 1 My. & K. 226.

[2] *Docker* v. *Somes*, 2 My. & K. 655; *Townend* v. *Townend*, 1 Giff. 201; *Willitt* v. *Blandford*, 1 Hare, 253.

[3] *Keech* v. *Sandford*, 1 L. C. 39.

[4] *Fox* v. *Mackreth*, 1 L. C. 104.

[5] *Morret* v. *Paske*, 2 Atk. 54.

[6] *Powell* v. *Glover*, 3 P. W. 25.

[7] *Wedderburn* v. *Wedderburn*, 4 My. & Cr. 41.

[8] *Gt. Luxembourg Rail. Co.* v. *Magnay*, 25 Beav. 586.

[9] *Docker* v. *Somes*, 2 My. & K. 665; *Foster* v. *M'Kinnon*, 5 Gr. 510.

although he must account for the profits of the money he employed, he will have an allowance made to him for his loss of time and for his skill and trouble.[1]

One trustee not liable for his co-trustee.

In *Townley* v. *Sherborne*,[2] the extent of the responsibility of one trustee for the acts or defaults of his co-trustee was first discussed. A., B., C., and D., were trustees of some leasehold premises. A. and B. collected the rents during the first year and a half, and *signed acquittances*, but from that period the rents were uniformly received by an assign of C. The liability of A. and B. during the first year and a half was undisputed, but the question was raised whether they were not also chargeable with the rents which had accrued subsequently, but had never come to their hands? After much consideration, the judges decided —That where lands or leases were conveyed to two or more upon trust, and one of them receives all or the most part of the profits, and after dieth or decayeth in his estate, his co-trustee shall not be charged or be compelled in the Court of Chancery to answer for the receipts of him so dying or decayed, unless some practice, fraud, or evil-dealing appears to have been in them, to prejudice the trust, for they being by law joint-tenants, or tenants in common, every one by law may receive either all or as much of the profits as he can come by; it is no breach of trust to permit one of the trustees to receive all, or the most part of the profits, it falling out many times that some of the trustees live far from the lands, and are put in trust out of other respects than to be troubled with the receipt of the profits. And it was also resolved that if, upon the proofs of circumstances, the court should be satisfied that there had been any *dolus malus*, or any evil practice, fraud, or ill intent in him that permitted his companion to receive the whole profits, he

Unless in case of fraud or misconduct.

[1] *Brown* v. *Litton*, 1 P. W. 140; *Brown* v. *De Tastet*, Jac. 284.

[2] 2 L. C. 778.

should be charged though he received nothing.[1] It was also decided in *Townley* v. *Sherborne*, that if a trustee joined with his co-trustees in *signing receipts*, he was liable, even though he had received nothing; but in later times the rule has been established that a trustee who joins in a receipt for conformity, but without receiving, shall not, by that circumstance alone, be rendered liable for a misapplication by the trustee who receives, for "it seems to be substantial injustice to decree a man to answer for money which he did not receive, at the same time that the charge upon him, by his joining in the receipts, is but notional."[2] Where the administration of the trust is vested in co-trustees, a receipt for money paid to the account of the trust must be authenticated by the signature of all the trustees in this their joint capacity, and it would be tyranny to punish a trustee for an act, which the very nature of his office will not permit him to decline.[3]

Trustee not liable for joining *pro formâ* in receipts.

At law, where trustees join in a receipt, *primâ facie* all are to be considered as having received the money. But it is competent to a trustee, and, if he means to exonerate himself from that inference, it is necessary for him to show that the money acknowledged to have been received by all, was in fact received by one, and the other joined only for conformity.[4]

Onus on trustee to prove that he did not actually receive.

Though a trustee is safe if he does no more than authorise the receipt and retainer of the money by his co-trustee, yet he will not be justified in allowing the money to *remain* in his hands for a longer period than the circumstances of the case reasonably require.[5]

Trustee joining in a receipt must not permit the money to lie in the hands of a co-trustee.

[1] *Mucklow* v. *Fuller*, Jac. 198; *Booth* v. *Booth*, 1 Beav. 125.
[2] *Fellows* v. *Mitchell*, 1 P. W. 81; *In re Fryer*, 3 K. & J. 317.
[3] Lewin, 215.
[4] *Brice* v. *Stokes*, 2 L. C. 785.
[5] *Brice* v. *Stokes*, 11 Ves. 319; *Thompson* v. *Finch*, 8 De G. M. & G. 560; *Walker* v. *Symonds*, 3 Swanst. 1; *Hanbury* v. *Kirkland*, 3 Sim. 265.

Co-executors answerable for their own acts only.

Co-executors, like co-trustees, are generally answerable, each for his own acts only, and not for the acts of any co-executor.[1] But in respect of receipts, the case of co-executors is materially different from that of co-trustees, and this difference arises not from any principle, but from the different powers with which co-trustees and co-executors are respectively invested by the law, so that a particular circumstance which would afford a presumption of the performance of an act involving responsibility in the case of an executor, would not afford any presumption thereof, in the case of a trustee. An executor has, independently of his co-executor, a full and absolute control over the personal assets of the testator, and is competent to give valid discharges by his own separate act. If, therefore, an executor join with a co-executor in a receipt, he does an unnecessary and voluntary act, and will therefore be answerable for the application of the fund.[2] In *Westley* v. *Clarke*,[3] this general rule was thus modified. T., one of three executors, had called in a sum of money, secured by a mortgage for a term of years, and received the amount, and *afterwards*, but the same day, sent round his clerk to his co-executors, with a particular request that they would execute the assignment and sign the receipt, which they accordingly did. T. afterwards became bankrupt, and the money was lost, and thereupon a bill was filed to charge the co-executors. Lord Northington said,—"If it plainly appears that only one executor received and discharged the estate indebted, and assigned the security, and the others joined afterwards without any reason and without being in a capacity to control the act of their co-executor, either before or after the act was done, what grounds has any court of conscience to charge him? The only act that affected the assets was the first that discharged the debt." His Lord-

Difference between co-trustees and co-executors.

Executor joining in receipt *primâ facie* liable.

[1] *Williams* v. *Nixon*, 2 Beav. 472.

[2] *Brice* v. *Stokes*, 11 Ves. 319.

[3] 1 Eden. 357.

ship was therefore of opinion that the co-executors were not liable for the misapplication by the co-executor. The rule, as now recognised, is best explained by Lord Redesdale in *Joy* v. *Campbell*,[1] "The distinction," he observes, "seems to be this, with respect to mere signing; that if the receipt be given for the purpose of mere form, then the signing will not charge the person not receiving; but if it be given under circumstances purporting that the money, though not actually received by both executors, was under the control of both, such a receipt shall charge; and the true question in all these cases seems to have been whether the money was under the control of both executors.[2]

True rule as to receipts.

An express clause is usually inserted in trust-deeds, that one trustee shall not be answerable for the receipts, acts, or defaults, of his co-trustees. But equity infuses such a proviso into every trust-deed,[3] and a person can have no better right from the expression of that which, if not expressed, has been virtually implied.[4] And now, by Lord St Leonard's act,[5] every instrument creating a trust shall be deemed to contain the usual indemnity and re-imbursement clauses, and therefore, in future, the express introduction of them into deeds and wills may be safely dispensed with.

Indemnity clauses.

As to the value and effect of an indemnity clause, the case of *Wilkins* v. *Hogg*[6] is in point. There, a testatrix, by her will in 1854, after appointing three trustees, declared each trustee should be answerable only for losses arising from his own default, and not for involuntary acts, or for the acts or defaults of his

Wilkins v. *Hogg*.

[1] 1 Sch. & Lef. 341.
[2] *Walker* v. *Symonds*, 3 Swanst. 1; *Hovey* v. *Blakeman*, 4 Ves. 608.
[3] *Dawson* v. *Clarke*, 18 Ves. 254.
[4] *Worrall* v. *Harford*, 8 Ves. 8; *Rehden* v. *Wesley*, 29 Beav. 213.
[5] 22 & 23 Vict., c. 35, s. 31.
[6] 8 Jur. N. S. 25; 3 Giff. 116.

co-trustees; and particularly that any trustee who should pay over to his co-trustee, or should do or concur in any act enabling his co-trustee to receive any moneys for the general purposes of her will, should not be obliged to see to the due application thereof, nor should such trustee be subsequently rendered responsible by any express notice or intimation of the actual misapplication of the same moneys. The three trustees joined in signing and giving receipts to two insurance companies for the two sums of money paid by them, but two of the trustees permitted their co-trustee to obtain the money without ascertaining whether he had invested it. That trustee having misapplied the money, a bill was filed for the purpose of making his co-trustees personally liable. Lord Westbury, C., held that they were not liable. His lordship said,—"This clause excluded the possibility of any liability except for actual misappropriation. There were three modes in which a trustee would become liable according to the ordinary rules of law,—first, where being the recipient, he hands over the money without securing its due application; secondly, where he allows a co-trustee to receive money without making due inquiry as to his dealing with it; and thirdly, where he becomes aware of a breach of trust, either committed or meditated, and abstains from taking the needful steps to obtain restitution or redress. The framer of the clause under examination knew these three rules, and used words sufficient to meet all these cases. There remained, therefore, only personal misconduct, in respect of which a trustee, acting under this will, would be responsible. He would still be answerable for collusion if he handed over trust money to his co-trustee, with reasonable ground for believing, or suspicion, that that trustee would commit a breach of trust; but no such case as this was made by the bill."

The two primary duties of a trustee are, first, to

carry out the directions of the person creating the trust, and secondly, to place the trust property in a state of security. Duties of trustees.

Thus, if a trust fund be an equitable interest, of which the legal estate cannot be at present transferred to an encumbrancer, it is his duty to lose no time in giving notice of his own interest to the person in whom the legal interest is vested; for, otherwise, he who created the trust might encumber the interest he has settled, in favour of a purchaser without notice, who, by first giving notice to the legal holder, might gain a priority.[1] Reduction into possession.

If the trust fund be a chose in action, as a debt which may be reduced into possession, it is the trustee's duty to be active in getting it in, and any unnecessary delay in this respect will be at his own personal risk.[2] Choses in action.

An executor is not to allow the assets of the testator to remain outstanding upon *personal* security, though the debt was a loan by the testator himself on what he deemed an eligible investment.[3] Where the trust money cannot be applied, either immediately or by a short day, to the purposes of the trust, it is the duty of the trustee to make the fund productive to the *cestui que trust*, by the investment of it on some proper security. The trustee is not justified in lending on personal security, however good,[4] unless expressly empowered to do so by the instrument creating the trust.[5] Personal security. Investment.

In the absence of any express power created by the settlement, and independently of any power which may be given by any statute for the time being in force, Investment in the three per cent. consols.

[1] *Jacob* v. *Lucas*, 1 Beav. 436.
[2] *Grove* v. *Price*, 26 Beav. 103.
[3] *Paddon* v. *Richardson*, 7 De G. M. & G. 563; *Clough* v. *Bond*, 3 My. & Cr. 496
[4] *Graves* v. *Strahan*, 8 De G. M. & G. 291.
[5] *Paddon* v. *Richardson*, 7 De G. M. & G. 563.

trustees, executors, or administrators, should invest in one of the Government or Bank annuities.[1]

22 & 23 Vict., c. 35. East India stock.

By Lord St Leonard's Act, 22 & 23 Vict., c. 35, s. 32, trustees, executors, and administrators, where not expressly forbidden by the instrument creating the trust, are authorised to invest trust funds in the stock of the Bank of England or Ireland, or in East India Stock.[2]

23 & 24 Vict., c. 145.

By stat. 23 & 24 Vict., c. 145, s. 25, it is enacted that trustees having trust money in their hands which it is their duty to invest at interest, shall be at liberty, at their discretion, to invest the same in any of the parliamentary stocks or public funds, or in Government securities, and such trustees shall also be at liberty, at their discretion, to call in any trust funds invested in any other securities than as aforesaid, and to invest the same on any such securities as aforesaid (except in the Three per Cent. Consolidated Bank Annuities), and no such change of investment as aforesaid shall be made where there is a person under no disability entitled in possession to receive the income of the trust-fund for his life, or for a term of years determinable with his life, or for any greater estate, without the consent, in writing, of such person.

30 & 31 Vict., c. 132.

And by stat. 30 & 31 Vict., c. 132, s. 2, it is enacted that, except where expressly forbidden by the instrument creating the trust, "it shall be lawful for every trustee, executor, or administrator, to invest any trust fund in his possession or under his control in any

[1] *Baud* v. *Fardell*, 7 De G. M. & G. 628.

[2] See 23 & 24 Vict., c. 38, s. 12. General order under this act, dated 1st Feb. 1861; 30 & 31 Vict., c. 132, s. 1, which extends the power of investment to East India Stocks created after the date of 22 & 23 Vict., c. 35; and 34 & 35 Vict., c. 27, as to Debenture Stock. Lewin on Trusts, 252.

securities, the interest of which shall be guaranteed by Parliament."

Conversion of terminable and reversionary property.

As a general rule, where a testator subjects the residue of his personal estate to a series of limitations directly or by way of trust, without any particular directions as to the investment or mode of enjoyment, there, in the absence of indications of a contrary intention, such part of the residue as may be wearing out (such as leaseholds), must be converted, and put in such a state of investment as to be securely available for all persons interested in it. And if the residue comprises property of a reversionary nature, that also must be converted. The one rule protects the remainder-man, the other protects the tenant for life.[1]

Trustees ordered to invest in stock *or* in real securities.

When trustees or executors were directed by the will to convert the testator's property, and invest it in Government *or* real securities, and neglected to do either, it was for a long time a question whether they should be answerable for the principal money with interest; or the amount of stock which might have been purchased at the period when the conversion should have been made, with subsequent dividends, at the option of the *cestui que trust*, or whether they should be charged with the amount of principal and interest only, without an option to the *cestui que trust* of taking the stock and dividends. It has now been decided that the trustee is answerable only for the *principal money and interest*, and that the *cestui que trust* has no option of taking the stock and dividends. The principle upon which the court proceeds, is that the trustee is liable only for not having done what it was his duty to have done, and the measure of his responsibility is that which the *cestui que trust* must

[1] 2 Sp. 42, 552, 557; *Bate* v. *Hooper*, 5 De G. M. & G. 338.

have been entitled to in whatever mode that duty was performed.[1]

Remedies of *cestui que trust* in event of a breach of trust.

Into whose hands the estate may be followed.

If the alienee be a volunteer, then the estate may be followed into his hands whether he had notice of the trust or not,[2] and if the alienee be a purchaser of the estate, even for valuable consideration, but with notice, the same rule applies.[3] If on the contrary a *bonâ fide* purchaser for valuable consideration, having the legal estate, have not notice, his title, even in equity, cannot be impeached, and he takes the land freed from the trust.[4]

Purchaser with notice cannot protect himself by getting in the legal estate from an express trustee.

If the purchaser have no notice of the trust at the time of the purchase, but afterwards discovers the trust, and obtain a conveyance from the trustee, he cannot protect himself by taking shelter under the legal estate; for this is not like getting in a first mortgage, which the first mortgagee has a right to transfer to whomsoever he will,[5] but here notice of the trust converts the purchaser into a trustee, and he must not, to get a plank to save himself, be party to a breach of trust.[6]

Breach of trust creates a simple contract debt.

The debt created by a breach of trust is regarded only as a simple contract debt, both at law and in equity, even where the trust arises under a deed executed by the trustees, unless the trustee who committed such breach of trust has acknowledged the debt under seal.[7] But the mere acceptance by deed of the trust will not create a specialty, unless there be a covenant, express or implied, for payment of the trust

[1] *Robinson* v. *Robinson*, 1 De G. M. & G. 247.

[2] *Spurgeon* v. *Collier*, 1 Eden. 55.

[3] *Wigg* v. *Wigg*, 1 Atk. 382; *Kennedy* v. *Daly*, 1 Sch. & Lef. 355; *Daniels* v. *Davison*, 16 Ves. 249.

[4] *Thorndike* v. *Hunt*, 3 De G. & Jo. 563; *Jones* v. *Powles*, 3 My. & K. 581; *Pilcher* v. *Rawlings*, 20 W. R. 281.

[5] *Bates* v. *Johnson*, Johns. 304.

[6] *Carter* v. *Carter*, 3 K. & J. 617; *Sharples* v. *Adams*, 32 Beav. 213; Lewin, 616.

[7] St. 1285, 1286; 2 Sp. 936.

fund.[1] But since the act (32 & 33 Vic., c. 46) abolishing the priority of specialty creditors in the administration of estates of persons dying after the 1st day of January 1870, the distinction is likely to become of little importance.

Right of following the property into which the trust-fund has been converted.

If the trust estate has been tortiously disposed of by the trustee, the *cestui que trust* may attach and follow the property that has been substituted in the place of the trust estate, so long as the metamorphoses can be traced.[2]

When money, notes, &c., may be followed.

Money, notes, and bills may be followed by the rightful owner, where they have not been circulated or negotiated, or the person to whom they so passed, had express notice of the trust,[3] and the only difference to be taken, between money on the one hand, and notes and bills on the other, is that money is not earmarked, and therefore cannot be traced, except under particular circumstances; but notes and bills, from carrying a number or date, can in general be identified by the owner without difficulty.[4]

Trustee must keep separate accounts.

In laying out trust-monies, a trustee must be careful to keep his own property separate from the trust fund; for if he mix them, the *cestui que trust* will be held entitled to every portion of the blended property which the trustee cannot prove to be his own.[5]

Interest payable on breach of trust.

It may be stated as a general rule, that if a trustee be guilty of any unreasonable delay in investing or transferring the fund, he will be answerable to the *cestui que trust* for interest during the period of his laches.[6]

[1] *Isaacson* v. *Harwood*, L. R. 3 Ch. 225; *Holland* v. *Holland*, L. R. 4 Ch. 449.

[2] Lewin, 645; *Frith* v. *Cartland*, 2 Hem. & M. 417; *Ernest* v. *Croysdell*, 2 De G. F. & J. 175; *Hopper* v. *Conyers*, L. R. 2 Eq. 549.

[3] *Verney* v. *Carding*, cited *Joy* v. *Campbell*, 1 Sch. & Lef. 345.

[4] Lewin, 647; *Ford* v. *Hopkins*, 1 Salk. 283.

[5] *Lupton* v. *White*, 15 Ves. 432; *Mason* v. *Morley*, 34 Beav. 471, 475.

[6] *Stafford* v. *Fiddon*, 23 Beav. 386.

When extra interest charged.

It is not easy to define the circumstances under which the court will charge executors and trustees with more than four per cent., or with compound interest. The rules on this subject may be thus stated. The court will charge more than four per cent. upon balances in the hands of a trustee[1]:—

(1.) Where he ought to have received more, as where he had improperly called in a mortgage carrying five per cent.

(2.) Where he had actually received more than four per cent.

(3.) Where he must be presumed to have received more, as if he had traded with the money, in which case the *cestui que trust* has it at his option to take the profits actually obtained.[2]

(4.) Where the trustee is guilty of direct breaches of trust, or gross misconduct.[3]

Acquiescence, &c.

The remedy of a *cestui que trust* against his trustee for breach of trust of any sort, may be barred by the concurrence of the *cestui que trust*, and his acquiescence, or by his executing a release.[4]

Persons under disability.

Persons under disability, as married women,[5] or infants,[6] who have concurred in a breach of trust, may nevertheless proceed against the trustees, except where they have by their own fraud induced the

[1] *Att.-Gen.* v. *Alford*, 4 De G. M. & G. 851; *Penny* v. *Avison*, 3 Jur. N. S. 62.

[2] *Jones* v. *Foxall*, 15 Beav. 392.

[3] *Mayor of Berwick* v. *Murray*, 7 De G. M. & G. 519; *Townend* v. *Townend*, 1 Giff. 212.

[4] *Brice* v. *Stokes*, 2 L. C. 785; *Harden* v. *Parsons*, Eden. 145; *Burrows* v. *Walls*, 5 De G. M. & G. 233; *Farrant* v. *Blanchford*, 1 De G. Jo. & Sm. 107, 119.

[5] *Parkes* v. *White*, 11 Ves. 221.

[6] *Wilkinson* v. *Parry*, 4 Russ. 276.

trustees to deviate from the proper performance of their duties.[1]

Release or confirmation.

A *cestui que trust* may, by a release or confirmation, prevent himself from taking proceedings against trustees for a breach of trust,[2] but neither will be binding on him unless he had a full knowledge of the facts of the case.[3]

Settlement of accounts.

A trustee is entitled to have his accounts examined and to have a settlement of them. If the *cestui que trust*, being *sui juris*, is satisfied that nothing more is due to him, he ought to close the account, and give an acknowledgment equivalent to a release. On the other hand, if the *cestui que trust* is dissatisfied with the accounts, he ought to have the accounts taken. He is bound to adopt one of these two courses; he is not at liberty to keep a chancery suit hanging for an indefinite time over the head of the trustee.[4]

[1] *Savage* v. *Foster*, 9 Mod. 35; *Wright* v. *Snowe*, 2 De G. & Sm. 321; *In re Lush's Trusts*, L. R. 4 Ch. 591.

[2] *French* v. *Hobson*, 9 Ves. 103.

[3] *Lloyd* v. *Atwood*, 3 De G. & Jo. 650; *Kay* v. *Smith*, 21 Beav. 522; *Burrows* v. *Walls*, 5 De G. M. & G. 254.

[4] 2 Sp. 46, 47, 921.

CHAPTER VII.

DONATIONES MORTIS CAUSA.

Essentials of.

Must be made in expectation of death.

It is essential to a valid *donatio mortis causâ* that it should be made "in such a state of illness or expectation of death, as would warrant a supposition that the gift was made in contemplation of that event."[1]

On condition to be absolute on donor's death. Revoked by recovery or resumption.

A donatio mortis causâ must be made on the condition, expressed or implied, that the gift shall be absolute only in case of the donor's death, and shall therefore be revocable during his life.[2] And if the donor recover from his illness, or if he resume the possession of the gift, it will be defeated.[3] In *Staniland* v. *Willott*,[4] the plaintiff, being possessed of shares in a public company, transferred, when in a state of extreme illness, the shares into the name of the defendant; the plaintiff having recovered, but having subsequently become a lunatic, a bill was filed in his name by his committee to have the defendant declared a trustee of the shares. It was held that the plaintiff having survived the sickness during which the transfer was made, the gift could not operate as a *donatio mortis causâ;* and it appearing that the defendant had received the gift on the distinct understanding that it

[1] *Edwards* v. *Jones*, 1 My. & Cr. 233; *Duffield* v. *Elwes*, 1 Bligh. N. S. 530.

[2] *Edwards* v. *Jones*, 1 My. & Cr. 233.

[3] *Ward* v. *Turner*, 1 L. C. 816; *Bunn* v. *Markham*, 7 Taunt. 231.

[4] 3 Mac. & G. 664.

was to be absolute only in the event of the plaintiff's death, the defendant was held a trustee of the shares for the plaintiff.

How intention to give is manifested. Delivery essential.

If the intention be expressed in writing, but no delivery takes place, even though the document be signed by the donor, it will be ineffectual as a *donatio mortis causâ*, for, in fact, it is a legacy, and the writing will be held a testamentary document, and therefore, if not attested by two witnesses, as directed by the Wills Act,[1] it will be void as a testamentary document.[2] But it may be good as a declaration of trust.[3]

If the gift is made by parol, without delivery of the article, it will be equally ineffectual whether as a gift *inter vivos*, or as a *donatio mortis causâ*, or as a testamentary disposition.[4]

Donationes mortis causâ are not void by the Wills Act.[5]

Imperfect testamentary gift.

If a donor intends to make a testamentary gift which turns out to be ineffectual, it will not be supported as a *donatio mortis causâ*. Thus in *Mitchell* v. *Smith*,[6] A. put into the hands of B. certain promissory notes, saying, "I give you these notes." A., on being reminded that they wanted indorsement, indorsed them in the presence of a witness as follows:—"I bequeath, pay the within contents to B. or his order at my death." Turner, L. J., said, that the indorsement of a promissory note, in order to be effectual, must be such as to enable the indorsee to negotiate the note. It was clear, however, that B. was not intended to have the power of doing this during the testator's life. The language of the indorsement and the evidence showed

[1] 1 Vict., c. 26.
[2] *Rigden* v. *Vallier*, 2 Ves. Sr. 258; *Tapley* v. *Kent*, 1 Rob. 400.
[3] *Morgan* v. *Malleson*, L. R. 10 Eq. 475.
[4] *Tate* v. *Hilbert*, 2 Ves. Jr. 120.
[5] 1 Vict., c. 26; *Moore* v. *Darton*, 4 De G. & Sm. 519.
[6] 12 W. R. 941.

that a testamentary disposition was intended, and as this was invalid, B. would not take.

Ineffectual gift *inter vivos*.

So also if the donor intends to make a gift *inter vivos* which is ineffectual, it cannot be supported as a *donatio mortis causâ*.

In *Edwards* v. *Jones*,[1] the obligee of a bond, five days before his death, signed a memorandum, not under seal, which was endorsed upon the bond, and which purported to be an assignment of the bond without consideration, to a person to whom the bond was at the same time delivered. The circumstances of the transaction did not constitute, in the opinion of the court, a *donatio mortis causâ*. It was also held that the gift was incomplete, and as it was without consideration, the court could not give effect to it. "It is argued," said the learned judge, "that the bonds were delivered either by way of *donatio mortis causâ*, or as a gift *inter vivos*. Now, in order to be good as a *donatio mortis causâ*, the gift must have been made in contemplation of death, and intended to take effect only after the donor's death. If it appeared, however, from the circumstances of the transaction, that the donor really intended to make an immediate and irrevocable gift of the bonds, that would destroy the title of the party who claims them as a *donatio mortis causâ*.

An attempt to make an irrevocable gift *inter vivos* cannot be upheld as a *donatio mortis causâ*.

"In the present case the transaction is in writing, and this is a strong circumstance against the presumption of its being a *donatio mortis causâ*. Here is an instrument purporting to be a regular assignment exactly in the same form as where the purpose is absolutely and at once to pass the whole interest in the subject-matter. A party making a *donatio mortis causâ* does not part with his whole interest, save only

A *donatio mortis causâ* is a gift to become absolute on donor's death.

[1] 1 My. & Cr. 226.

in a certain event; and it is of the essence of the gift that it shall not otherwise take effect. Such a gift leaves the whole title in the donor, unless the event occurs which is to divest him. Here, however, there is an actual assignment by which the donor transfers all her right, title, and interest to her niece.

"The transaction being inoperative for the purpose of transferring the bond which was a mere chose in action, the question comes to be, whether the mere handing over of the bond would constitute a good gift *inter vivos*. This is a purely voluntary gift, and cannot be made effectual without the interposition of the court. This court will not aid a volunteer to carry into effect an imperfect gift."

What is a sufficient delivery.

To donee or agent for him.

Not to donor's agent.

If a personal chattel be actually given by the donor himself to the donee, or by some other person at the donor's request, into the hands of the donee, or to some other person as trustee or agent for the donee, a good delivery is constituted. In *Farquharson* v. *Cave*,[1] it was held that a mere delivery to an agent, in the character of an agent for the donor, would amount to nothing; it must be a delivery to the donee, or some one for the donee.[2]

Delivery of means of obtaining the gift, good.

Where the chattel itself has not been delivered, it would seem that the delivery of some means of obtaining it, would be sufficient, though not the delivery of a mere symbol.[3] In *Jones* v. *Selby*,[4] the delivery of the key of a box was held to be a sufficient *donatio mortis causâ* of its contents. In *Trimmer* v. *Danby*,[5] upon the death of a testator, ten Austrian bonds were found, amongst other securities, in a box at his house, with the following endorsement:—"The first five

[1] 2 Coll. Ch. Ca. 367.
[2] *Moore* v. *Darton*, 4 De G. & Sm. 517.
[3] *Ward* v. *Turner*, 1 L. C. 819; *Snelgrove* v. *Bailey*, 3 Atk. 214.
[4] Prec. in Ch. 300.
[5] 25 L. J. Ch. 424.

numbers of these Austrian bonds belong to and are H. D.'s property," signed by the testator. H. D. was the testator's housekeeper, and the key of the box was given into her custody. It was held, that as there had been no actual transfer or delivery into the hands of H. D. the bonds still remained part of the testator's assets; that the testator gave the key to her in her character of housekeeper, and for the purpose of taking care of it for his benefit; that the testator meant to give the bonds to H. D.; that the bonds were capable of being transferred by hand; and that in documents of this nature it must be proved that there had been an actual transfer of the interest, and everything must be done which is capable of being done to effect the transfer.[1]

Donor must part with dominion over the gift.

Not only must possession be given to the donee, but the donor must part with all dominion over the gift. Thus, in *Hawkins* v. *Blewitt*,[2] A., being in his last illness, ordered a box containing wearing apparel to be carried to the defendant's house to be delivered to the defendant, giving no further directions respecting it. On the next day the defendant brought the key of the box to A., who desired it to be taken back, saying, he should want a pair of breeches out of it. Held, not to be a good *donatio mortis causâ*, and the learned judge said, "In the case of a *donatio mortis causâ* possession must be immediately given; and also in parting with the possession it is necessary that the donor should part with the dominion over it. It seems rather to have been left in the defendant's care for safe custody, and was so considered by herself."

Chose in action.

If the thing given as a *donatio mortis causâ* be, not a chattel in possession, but a chose in action, delivery

[1] *Powell* v. *Hillicar*, 26 Beav. 261. [2] 2 Esp. 663.

of some document essential to the recovery of the chose in action is sufficient.[1]

What may be given as *donationes mortis causâ*.

There cannot, it seems, be a good *donatio mortis causâ* of a cheque upon a banker.[2] There may be a good *donatio mortis causâ* of a bond.[3] The delivery of the mortgage deeds of real estate will constitute a valid *donatio mortis causâ*.[4] So also will the delivery of a promissory note, payable to order, though not indorsed.[5] In *Moore* v. *Darton*,[6] where, on a loan, the borrower had given the lender a receipt in the following terms:—"Received of Miss D. £500, to bear interest at five per cent. per annum," it was held that a delivery of the receipt to an agent of the borrower by the creditor on her deathbed, stating that she wished the debt to be cancelled, was a good *donatio mortis causâ*.

How it differs from a legacy.

A good *donatio mortis causâ* partakes partly of the character of a gift *inter vivos*, and partly of that of a legacy. It differs from a legacy in these respects,—1. It takes effect *sub modo* from the delivery in the lifetime of the donor, and therefore cannot be proved as a testamentary act. 2. It requires no assent or other act on the part of the executor or administrator to perfect the title of the donee. It differs from a gift *inter vivos*, in certain respects, in which it resembles a legacy. 1. It is revocable during the donor's lifetime.[7] 2. It may be made to the donor's wife.[8] 3. It is liable to the debts of the donor on a deficiency of assets.[9] 4. It is subject to legacy duty.[10]

How it differs from a gift *inter vivos*.

[1] *Moore* v. *Darton*, 4 De G. & Sm. 519.

[2] *Tate* v. *Hilbert*, 4 Bro. C. C. 286; *Boutts* v. *Ellis*, 4 De G. M. & G. 249; *Hewitt* v. *Kaye*, L. R. 6 Eq. 198.

[3] *Snelgrove* v. *Bailey*, 3 Atk. 214; *Gardner* v. *Parker*, 3 Mad. 184.

[4] *Duffield* v. *Elwes*, 1 Bligh, N. S. 497.

[5] *Veal* v. *Veal*, 27 Beav. 303.

[6] 4 D. G. & Sm. 517.

[7] *Smith* v. *Casen*, cited 1 P. W. 406; *Jones* v. *Selby*, Prec. Ch. 300.

[8] *Tate* v. *Luthead*, Kay 658.

[9] *Smith* v. *Casen*, cited 1 P. W. 406.

[10] 8 & 9 Vict., c. 76; 1 Sp. 196; St. 606 (a).

CHAPTER VIII.

LEGACIES.

Suits for legacies only in equity unless executor consents.

No suit will lie at the common law to recover legacies, unless the executor has assented thereto.[1] But in cases of specific legacies of goods, after the executor has assented thereto, the property vests immediately in the legatee, who may maintain an action at law for the recovery thereof.[2]

Reasons.

It is not difficult to see the reason why it is inexpedient that courts of law should have jurisdiction over legacies. Courts of law cannot impose such terms as justice may require, which a court of equity can, upon the parties recovering those legacies; so that, for instance, a suit might be maintained by a husband, for a legacy given to his wife, without making any provision for her, or for her family; whereas, a court of equity would require such a provision to be made.[3]

Equity jurisdiction when exclusive.

Where the bequest of a legacy involves the execution of a trust, express or implied, or the legacy is charged on land, or the other courts cannot take due care of the interests of all parties, courts of equity will exert an exclusive jurisdiction.[4]

When concurrent.

And even where the executor has assented to the legacy, courts of equity will now exercise a concurrent jurisdiction with the other courts over legacies; because the executor is

[1] *Deeks* v. *Strutt*, 5 T. Rep. 690.
[2] *Doe* v. *Gay*, 3 East. 120.
[3] St. 592.
[4] St. 595–597, 602.

treated as a trustee for the benefit of the legatees, a universal ground for the interposition of equity,[1] and also, because the aid of equity may be required to obtain discovery, account, or distribution of assets, or some other mode of relief which other courts are, or were, incompetent to afford.[2]

By stat. 20 & 21 Vict., c. 77, s. 23, no suit for legacies or the distribution of residues shall be entertained by Court of Probate, or by any other court or person whose jurisdiction as to matters and causes testamentary is thereby abolished. Stat. 20 & 21 Vict., c. 77.

Bequests, or legacies, may be classed under three heads, general, specific, and demonstrative. A legacy is general where it does not amount to a bequest of any particular thing as distinguished from all others of the same kind. Thus, if a testator gives A. a diamond ring, or £1000 stock, or a horse, not referring to any particular diamond ring, stock, or horse, these legacies will be general. The terms "pecuniary legacies," and "general legacies," are sometimes used as synonymous; but the former words only mean "a legacy of money," and therefore, may be either "specific," or "general."[3] Division of legacies. 1. General.

A legacy is specific when it is a bequest of a particular thing, or sum of money, or debt, as distinguished from all others of the same kind. Thus, if a testator gives B. "my diamond ring," "my black horse," "my £1000 stock," or "£1000 contained in a particular bag," or "owing to me by C.," in these and the like instances, the legacies are specific.[4] 2. Specific.

[1] *Hurst* v. *Beach*, 5 Madd. 360.
[2] St. 593.
[3] 1 Rop. Leg., by White, 191 *n*; 1 Vict., c. 26, s. 27; *Hawthorn* v. *Shedden*, 3 Sm. & G. 293; *Fielding* v. *Preston*, 1 De G. & Jo. 438.
[4] *Stephenson* v. *Dowson*, 3 Beav. 342; *Manning* v. *Purcell*, 7 De G. M. & G. 55.

3. Demonstrative.

A legacy is *demonstrative* when "it is in its nature a general legacy, but there is a particular fund pointed out to satisfy it."[1] Thus, if a testator bequeaths £1000 out of his Reduced Bank Three per Cents., the legacy will not be specific, but demonstrative.[2]

Distinctions.

It is a matter of great difficulty, though, at the same time of great practical importance, to distinguish these different species of legacies, one from the other. The chief points of difference are these:—1. If, after payment of debts, there is a deficiency of assets for payment of all the legacies, a general legacy will be liable to abate, but a specific legacy will not. 2. On the other hand, if a specific bequest is made of a fund, and the fund fails by alienation during the testator's lifetime, or otherwise, the legatee will not be entitled to any compensation out of the general personal estate of the testator; because nothing but the specific thing is given to the legatee.[3] 3. But with regard to a demonstrative legacy, it is so far of the nature of a specific legacy, that it will not abate with the general legacies, until the fund out of which it is payable is exhausted, and so far of the nature of a general legacy, that it will not be liable to ademption by the alienation or non-existence of the property pointed out as the primary means of paying it.[4]

Construction of legacies.

In deciding on the validity and interpretation of purely personal legacies, courts of equity in general follow the rules of the civil law, as recognised and acted on in the ecclesiastical courts; but as to the validity and interpretation of legacies charged on land, they generally follow the rules of the common law.[5]

[1] *Ashburner* v. *Macguire*, 2 L. C. 246; *Robinson* v. *Geldard*, 3 Mac. & G. 735.

[2] *Sparrow* v. *Josselyn*, 16 Beav. 135.

[3] 1 Rop. Leg., by White, 191–2.

[4] Rop. Leg., by White, 237; see generally, *Mullins* v. *Smith*, 1 Drew & Sm. 210; *Vickers* v. *Pound*, 6 Ho. of Lds., 885.

[5] St. 602–608.

CHAPTER IX.

CONVERSION.

"NOTHING is better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted, and this in whatever manner the direction is given, whether by will, by way of contract, marriage articles, settlement, or otherwise; and whether the money is actually deposited, or only covenanted to be paid; whether the land is actually conveyed, or only agreed to be conveyed, the owner of the fund, or the contracting parties, may make land money, or money land."[1] General rule. Money into land. Land into money.

It will be seen from the above that conversion of land into money, or money into land, may arise in two ways, *first*, under wills; *secondly*, under settlements and other instruments *inter vivos*. Having reference, therefore, to this primary division of the subject, and marking the distinction, where in any cases it is of importance, it is proposed to treat the subject under the following heads:— Conversion. By will or settlement.

1. What words are sufficient to produce conversion.
2. From what time conversion takes place.
3. The general effects of conversion.

[1] *Fletcher* v. *Ashburner*, 1 L. C. 741.

4. The results of a total or partial failure of the objects and purposes for which conversion has been directed.

What words are necessary.

1. *What words are sufficient to produce conversion.*

Conversion must be imperative.

The direction to convert either money into land, or land into money, must be express and imperative; for if conversion be merely optional, the property will be considered as real or personal, according to the actual condition in which it is found. Thus, in *Curling* v. *May*,[1] A. gave £500 to B. in trust, that B. should lay out the same upon a purchase of lands, *or* put the same out on good securities, for the separate use of his daughter H. (the plaintiff's then wife), her heirs, executors, and administrators, and died in 1729. In 1731, H., the daughter, died, without issue, before the money was invested in a purchase. The husband, as administrator, brought a bill for the money against the heir of H., and the money was decreed to the administrator; for the wife not having signified any intention of a preference, the court would take it as it was found: if the wife had signified any intention it should have been observed, but it was not reasonable at that time to give either her heir, or administrator, or the trustee the liberty to elect; for Lord Talbot said, it was originally personal estate, and yet remained so, and nothing could be collected from the will as to what was the testator's principal intention.[2]

As where limitations are adapted *only* to land.

But although the conversion is apparently optional, as where trustees are directed to lay out personalty, "either in the purchase of lands of inheritance, or at interest," or "in land or some other securities," as they shall think most fit and proper, yet if the limitations and trusts of the money directed to be laid out are only adapted to real estates, so as to denote the testator's intention that land shall be purchased, this

[1] Cited 3 Atk. 255.

[2] *Bourne* v. *Bourne*, 2 Hare 35.

circumstance will outweigh the presumed option, and the money will be considered land.[1] In short, in any case where it is clear that a testator, whatever may be the language he has used, intended that a conversion should take place at all events, equity holding the doctrine that the intent rather than the form is to be considered, will direct that the property should be converted in accordance with the testator's wishes.[2]

2. *Time from which conversion takes place.*

Time from which conversion takes place.

Subject to the general principle that the terms of each particular instrument must guide in the construction and effect of that instrument,[3] the rule is that in regard to wills, conversion takes place from the death of the testator,[4] and as to deeds or other instruments *inter vivos*, from the date of execution and delivery.

In wills from testator's death.

Deeds from execution and delivery.

As regards the time as from which, in the absence of special circumstances, conversion is to take place in the case of a deed, the observations of the Vice-Chancellor in *Griffith* v. *Ricketts*[5] are important. There a settlor conveyed the equity of redemption of real estate to trustees for sale for the benefit of his creditors, and on trust, if there should be any surplus, to pay the same to him, his executors, administrators, &c., to and for his and their own absolute use and benefit. *Held*, that this was a conversion of the real estate into personalty, as between the real and personal representatives of the settlor, on the following reasoning:— "A deed differs from a will in this material respect; the will speaks from the death, the deed from delivery. If, then, the author of the deed impresses upon his real estate the character of personalty, that, as between his real and personal representatives, makes it personal

Time from which conversion takes place in a deed.

[1] *Earlom* v. *Saunders*, Amb. 241.
[2] *Thornton* v. *Hawley*, 10 Ves. 129; *Grieveson* v. *Kirsopp*, 2 Kee. 653; *Davies* v. *Goodhew*, 6 Sim. 585; *Burrell* v. *Baskerfield*, 11 Beav. 525.
[3] *Ward* v. *Arch*, 15 Sim. 389.
[4] *Beauclerk* v. *Mead*, 2 Atk. 167.
[5] 7 Hare 311.

and not real estate from the delivery of the deed, and consequently at the time of his death. The deed thus altering the actual character of the property, is, so to speak, equivalent to a gift of the expectancy of the heir-at-law to the personal estate of the author of the deed. The *principle* is the same in the case of a deed as in the case of a will; but the application is different, by reason that the deed converts the property in the lifetime of the author of the deed, whereas, in the case of a will, the conversion does not take place until the death of the testator; and there is no principle on which the court, as between the real and personal representatives (between whom there is confessedly no equity), should not be governed by the simple effect of the deed in deciding to which of the two claimants the surplus belongs."

The *principle* is the same in a deed as in a will.

Clarke *v.* Franklin.

This rule was further illustrated in the case of *Clarke* v. *Franklin*.[1] There a settlement was executed of real estate, by deed (not enrolled), to the use of the settlor for life, with remainder (subject to a power of revocation never exercised) to the use of trustees and their heirs upon trust, to sell and pay certain sums of money to persons named, or to such of them as might be living at the settlor's death, and to apply the residue to charitable purposes. Some of the persons named survived the settlor, so that the purposes for which conversion was directed did not fail altogether, but the deed was void so far as it directed the proceeds of land to be applied to charitable purposes; and the question was, whether, under the circumstances, the surplus belonged to the heir or to the next of kin of the settlor. Vice-Chancellor Wood following *Hewitt* v. *Wright*[2] held that notwithstanding the trust for sale was not to arise until after the settlor's death, the property was impressed with the character of personalty immediately upon the execution of the deed, and

[1] 4 K. & J. 257. [2] 1 Bro. C. C. 86.

that the proceeds, so far as they were directed to be applied to charitable purposes, resulted to the settlor as personalty.

Rule as to deeds inapplicable when conversion is not the object.

But although it is true as a general rule that in a deed conversion takes place from the date of its execution, caution is required in applying that rule to instruments, such as mortgage deeds, where the general intention of the author of the trust is neither to convert nor to alter the devolution of property, but merely to raise money. Thus in *Wright* v. *Rose*,[1] A. being seised in fee of a freehold estate, borrowed £300 from B. the defendant, and secured the repayment of it with interest, by executing a mortgage deed of the estate, with power of sale, and by the terms of the deed, it was provided that the surplus moneys to arise from the sale, in case the same should take place, should be paid to A., his *executors* or *administrators*. A. died intestate, and without ever having been married. All the interest due on the mortgage money had been duly paid by him up to the time of his death, but the principal remained unpaid. The interest that accrued due after his death having remained unpaid, B. the mortgagee entered into possession, and afterwards sold the estate under the power of sale, for a sum which greatly exceeded the mortgage-money and interest. The question was whether the surplus of the purchase-moneys was real or personal estate. Sir J. Leach held that it was real estate on the following grounds :—"If the estate had been sold by the mortgagee in the lifetime of the mortgagor, then the surplus moneys would have been personal estate of the mortgagor, and the plaintiffs would have been entitled. But the estate being unsold at the death of the mortgagor, the equity of redemption descended to his heir, and he is now entitled to the surplus produce.[2]

As in mortgages.

[1] 2 Sim. & St. 323.

[2] See *Bourne* v. *Bourne*, 2 Hare 35.

Conversion depending on a future option to purchase.

Closely connected in appearance with the class of cases just referred to, though differing from them in important essentials, are those cases where the conversion depends on an option to be exercised at a future time. Thus in *Lawes* v. *Bennet*,[1] A. made a lease to B. for seven years, and on the lease was endorsed an agreement that if B. should within a limited time be minded to purchase the inheritance of the premises for £3000, A. would convey them to B. for that sum. B. assigned to C. the lease, and the benefit of this agreement. A. died, and by his will gave all his *real* estate generally to D. and all his *personal* estate to D. and E. Within the limited time, but after the death of A., C. claimed the benefit of the agreement from D., who accordingly conveyed the premises to C. for £3000. Held, that the sum of £3000, when paid, was part of the *personal* estate, and that E. was entitled to one moiety of it as such. "It is very clear," observed the Master of the Rolls, "that if a man seised of real estate contract to sell it, and die before the contract is carried into execution, it is personal property of him. Then the only possible difficulty in this case is, that it is left to the election of B. whether it shall be real or personal. It seems to me to make no distinction at all. . . . When the party who has the power of electing has elected, the whole is to be referred back to the original agreement, and the only difference is, that the real estate is converted into personal, at a future period."

Rents until option is exercised go as realty.

Until, however, in such a case the option to purchase is exercised, the rents and profits will go to the persons who were entitled to the property up to that time, as real estate.[2]

Devise of lands thus

A curious question sometimes arises where a testator devises lands over which a third party has a right

[1] 1 Cox. 167.

[2] *Townley* v. *Bedwell*, 14 Ves. 591; *Ex parte Hardy*, 30 Beav. 206.

at his option to purchase, whether, when such option is exercised, the purchase-money is to be bound by the same limitations as the real estate for which it has been substituted, or whether it is to follow the destination of the personal property of the testator. optionally purchaseable.

Thus in the case of *Drant* v. *Vause*,[1] under a lease for years, the lessees had an option to purchase the fee-simple of the demised lands. After the date of the lease, the lessor made his will, whereby he devised the lands, *specifically* describing them, to G. for life, with remainders over. After the testator's death, the lessees elected to purchase the fee-simple of the lands. *Held*, on the special terms of the will, that the purchase-money did not fall into the residue of the personal estate, but was subject to the same limitations as had been declared concerning the purchased lands, and therefore that G. took a life-interest in the purchase-money.[2] It must be observed that in the above case, after the testator had made the agreement, he *specifically* and *in express terms* devised the lands, on certain limitations, from which it might be inferred that he intended at all events, that the land or its value, in case the option should be exercised, should go to certain persons. It will be seen, therefore, on principle that in a similar case of agreement first, and will afterwards, if the will do not *specifically* refer to the property so agreed to be sold, no such intention will be inferred, and when the option is exercised, the purchase-money will fall into the personalty. This point was decided in *Collingwood* v. *Row*.[3] Specific devise subsequent to the contract for optional purchase.

In the case of *Weeding* v. *Weeding*,[4] the testator, *after* making a will devising a specific estate and bequeathing the personal residue to other persons, Specific devise prior to the contract for optional purchase.

[1] 1 Y. & C. C. C 580.
[2] *Emuss* v. *Smith*, 2 De G. & Sm. 722.
[3] 5 W. R. 484.
[4] 1 John & Hem, 424.

entered into a contract, giving an option of purchase over part of that estate, which option was exercised after his death. Held, that the property was converted from the date of the exercise of the option, and went to the residuary legatees. V.-C. Wood made the following observations :—"The testator must be presumed to know the law. With this knowledge he makes a will devising real estate in one way, and giving his personal estate upon different trusts. After this, he makes a contract, the effect of which he knows will be to give a third person the power of saying, at a future time, whether a certain portion of what was then his real estate, shall be realty or personalty. Then what indication have you in the will of the quality which the testator intended this property to possess? He only says, I wish A. to take what is land, and B. to take what is money. . . . . You cannot at anyrate assume an intention that the property, in any event, be divided in the particular proportions as to value, which existed at the date of the will." The learned judge then proceeds, and in a few words points out the true rule of distinction, it is conceived, which governs this class of cases. "I understand the principle on which the cases of *Drant* v. *Vause* and *Emuss* v. *Smith* were decided, to be this : when you find that in a will made *after* a contract giving an option of purchase, the testator, knowing of the existence of the contract, devises the *specific* property which is the subject of the contract, without referring in any way to the contract he has entered into, there it is considered that there is a sufficient indication of an intention to pass that property to give to the devisee all the interest, whatever it may be, that the testator had in it. This was the nature of both the authorities relied on; for in one the contract was before the will, and in the other, the same effect was produced by the subsequent republication of the will.

Distinction.

"But the case is very different, when, after having given the property by will, the testator makes a sale of it. If it is a sale out and out, there is no question that the devisee's interest is taken away. Here the testator first gives the Kentish Town estate to certain devisees, and his personalty to other persons. After that, a part of the estate ceases to be Kentish Town estate, and becomes personalty. There is no republication of the will after the contract by which this change would, in a certain contingency, be brought about. The intention is, that all the Kentish Town property is to go one way, all the personalty another. The testator must be taken to have known when he had entered into the contract that what would ultimately be Kentish Town estate would depend on the option of the lessee; and the inference is, that he meant his property to go according to the state to which it would be reduced by the exercise of that option."[1]

Where purpose subsequently fails, property is reconverted.

There is also another class of cases, where conversion may have been directed or agreed upon, yet from the course of *subsequent events* it may be a question whether such constructive conversion has not ceased, and the heir and next of kin been restored to their original rights. The principles which govern these cases will be treated of hereafter in the chapter on reconversion.[2]

The effects of conversion.

3. *As to the effects of conversion.*

These have been generally stated to be, to make personal estate real, and real estate personal.

(*a.*) Money directed to be turned into land, descends to the heir,[3] and land directed to be con-

[1] *Goold* v. *Teague*, 7 W. R. 84; *Woods* v. *Hyde*, 10 W. R. 339.

[2] See p. 163.

[3] *Scudamore* v. *Scudamore*, Prec. in Ch. 543.

verted into money, goes to the personal representatives.[1]

(*b.*) Money belonging to a married woman directed to be converted into land is liable to the husband's courtesy, though under the same circumstances it was held, in deference rather to the custom of conveyancers than to principle, that the widow was not entitled to her dower out of the money of her husband directed to be laid out in land.[2] This anomaly has been swept away by the Dower Act.[3]

(*c.*) Again, before the Wills Act,[4] an infant, under the age of 21, might make a will of personal estate; but he could not, during minority, dispose of personalty to be laid out in land.[5]

4. Results of total or partial failure.

4. *The results of a total or partial failure of the purposes for which conversion is directed.*

Total failure.

As to total failure. The universal rule may be thus stated—that where a conversion is directed or agreed upon, whether by *will* or *by settlement, or other instrument* inter vivos, *whether of money into land, or of land into money*, if the objects and purposes for which that conversion was intended have totally failed *before the instrument directing the conversion comes into operation*, no conversion will take place, but the property so directed or agreed to be converted, will remain in its original state, or rather, will result to the testator or settlor with its original form unchanged. In the words of Wood, V.-C., in the case of *Clarke* v. *Franklin*,[6] "So here, if at the moment when the grantor put his hand to this deed, the purpose for which conversion

Results unconverted.

[1] *Ashby* v. *Palmer*, 1 Mer. 296; *Elliott* v. *Fisher*, 12 Sim. 505.
[2] *Sweetapple* v. *Bindon*, 2 Vern. 536.
[3] 3 & 4 Will. IV., c. 105, s. 2.
[4] 1 Vict., c. 26.
[5] *Earlom* v. *Saunders*, Amb. 241.
[6] 4 K. & J. 257

was directed had failed, for instance, if he had given all the proceeds instead of a part to charitable purposes, so that the property would have been *at home* in his lifetime, the court would have regarded it as if no conversion had been directed, and the property would have resulted to the grantor as real estate.[1]

Where the purposes for which conversion is directed have *partially failed* before the instrument directing the conversion has come into operation, the rules are somewhat complex, and it will be necessary to deal *seriatim* with the cases, regard being had to the nature of the instrument by which such conversion is directed. Partial failure.

I. Cases under wills :— I. Under wills.
(*a.*) Of land into money.
(*b.*) Of money into land.

II. Cases under settlements or other instruments *inter vivos* :— II. Under instruments *inter vivos*.
(*a.*) Of land into money.
(*b.*) Of money into land.

With reference to each of these four cases, three questions will arise— Three questions.

1stly. To what extent is the trust for conversion still in force?

2dly. Who is to benefit by the lapse or failure, the heir, or the personal representative of the testator or settlor?

3dly. In what character will the benefit accruing to the testator's or settlor's real or personal representative be taken by such real or personal representative?

I. Cases under wills. I. Under wills.
(*a.*) Of land into money. Land into money.

[1] *Ripley* v. *Waterworth*, 7 Ves. 435; *Smith* v. *Claxton*, 4 Mad. 492.

Ackroyd v. *Smithson.*

In *Ackroyd* v. *Smithson*,[1] a testator gave several legacies, and ordered his real and personal estate to be sold, his debts and legacies to be paid out of the proceeds arising out of the sale, and the residue thereof he gave to certain legatees of a previous part of his will in the proportion of the legacies he had already given them. Two of the residuary legatees died during the testator's lifetime; their shares consequently lapsed. The next of kin claimed the lapsed shares as part of the personalty; and so far as they were constituted by personal estate, they were decreed to go to the next of kin of the testator; and so far as they were constituted of real estate, to his heir-at-law. It would, perhaps, be impossible to find a clearer exposition of the principles governing this class of cases than in the celebrated argument of Mr Scott, afterwards Lord Eldon. "That the heir-at-law is entitled to every interest in land not disposed of by his ancestor, is so much of a truism that it calls for no reasoning to support it. It is not necessary for the heir-at-law to deny that the intention of the testator has designed him nothing; his intention has been certainly equally unpropitious to the next of kin; but it is not enough that the testator did not intend that his heir should take, he must make a disposition in favour of another;[2] if he has not actually disposed of all his real estate, if he has not made a universal heir, the law will give such part of his real estate as he has not actually and eventually disposed of, even against his intention, and *à fortiori* in a case where he has expressed no intention, to the *hæres natus*. . . . . As to the question of fact, whether he meant that in some event only, or that, in all events, the produce of his real estate should be considered as personalty, we admit that in favour of his residuary legatees he meant to convert the whole into personalty, in case *all* his residuary legatees should eventually take the whole; but we contend that he has intimated no

There must be a gift over to exclude the heir.

[1] 1 Bro. C. C. 503, 1 L. C. 783. [2] *Fitch* v. *Weber*, p. 159, *post*.

intention as to that part of the produce, as to which his disposition, in the event which has happened, has failed of effect. He converts it out and out, indeed, if you speak of his intention as to the qualities of the property which his legatees were to take; but as to such part of the property as, in the event, they have not taken, he has not determined upon its nature; he never meant to determine upon its nature, as between his heir-at-law and his personal representative or next of kin, because he appears not to have adverted to the possibility of any events taking place which would give the one or the other an interest in his property, and he designed no part of his property for either. In the event, the one or the other must take some part of it; but to say he has made it all personal property, and that, therefore, the law must give it to the next of kin, is to apply an argument deduced from what was the testator's intention in case events had taken place which have not occurred, for the sake of proving a similar intention, if circumstances happened directly contrary to those with relatiou to which only the testator framed his intention. To argue from what the testator intended with respect to residuary legatees, by way of proving that he intended the same in favour of his next of kin, is to reason from a case in which intention *is* expressed to prove a like intention in a case which supposes the absence of intention."

Undisposed-of proceeds result to the heir.

From this case the questions, as to what extent the conversion is still in force, and who benefits by the lapse, will find a complete answer; but the further question still remains, whether the land directed to be sold results to the heir as real or personal property, a question that sometimes arises between the real and personal representatives of such heir. The doctrine on this subject is clearly laid down in the case of *Smith* v. *Claxton*,[1] a case illustrative of the principles governing

In what character the land to be sold results to the heir.

[1] 4 Mad. 492.

equity with reference to cases both of total as well as partial failure. "A devisor may give to his devisee either land or the price of land, at his pleasure, and the devisee must receive it in the quality in which it is given, and cannot intercept the purpose of the devisor. If it be the purpose of the testator to give lands to the devisee, the land will descend to his heir; if it be the purpose of the devisor to give the price of land to the devisee, it will, like other money, be part of his personal estate. Under every will when the question is whether the devisee or the heir, failing the devisee, takes an interest in the land, as land or money, the true inquiry is, whether the devisor has expressed a purpose that in the events which have happened the land shall be converted into money. Where a devisor directs his land to be sold, and the produce divided between A. and B., the obvious purpose of the testator is that there shall be a sale for the convenience of division, and A. and B. take their several interests as money and not land. So if A. dies in the lifetime of the devisor, and the heir stands in his place, the purpose of the devisor that there shall be a sale for the convenience of division still applies; and the heir will take the share of A., as A. would have taken it, as money and not land. But suppose A. and B. both to die in the lifetime of the devisor, and the whole interest in land descends to the heir, the question would then be, whether the devisor can be considered as having expressed any purpose of sale applicable to that event, so as to give the interest of the heir the quality of money. The obvious purpose of the devisor being that there should be a sale for the convenience of division between his devisees, that purpose could have no application to a case in which the devisees wholly failed, and the heir would therefore take the whole interest as land." From the course of this argument, and from the current of authorities, the rule would briefly seem to be this, that where it is necessary to sell the land for the purposes of the trust, and there is

Where sale is necessary.

It results as money to the heir.

only a partial disposition of the produce of the sale, here the surplus belongs to the heir as money and not as land, and will therefore go to his personal representative, even though the land may not have been sold during his lifetime.[1]

Money into land.

(*b.*) Money directed to be laid out in land.

The principle on which *Ackroyd* v. *Smithson* was decided applies also to the converse case of money directed to be laid out in the purchase of real estate, devised to uses which partially fail; for the undisposed-of interest in the money, or the estate if purchased with the money, will result for the benefit of the next of kin of the testator as personalty, and will not go to the heir-at-law.[2] The earlier cases seem to lay down a contrary doctrine. But Lord Cottenham, while Master of the Rolls, in the case of *Cogan* v. *Stephens*,[3] after examining all the conflicting authorities upon this subject, put an end to the anomaly supposed to exist in the law of conversion, by deciding in favour of the claims of the next of kin. In *Cogan* v. *Stephens*, the testator ordered that £30,000 should be laid out immediately by his executors in the purchase of an estate or estates in the county of Devon or Cornwall, the income of which should belong to his widow during her life, and after her decease to certain persons (all of whom died during the life of his widow, without issue) in tail, with remainder to a charity. The money was not laid out, and the gift to the charity being void under the statute of mortmain, it was held that the next of kin and not the heir-at-law of the testator was entitled to the fund. "If a testator," said his lordship, "devises land for purposes altogether illegal, or which altogether fail, the heir-at-law takes it as undisposed of. If a testator gives personal property for

Undisposed-of money results to personal representatives.

[1] *Wright* v. *Wright*, 16 Ves. 188; *Jessopp* v. *Watson*, 1 My. & K. 665; *Wall* v. *Colshead*, 2 De G. & Jo. 683.

[2] *Reynolds* v. *Godlee*, Johnston 536, 582.

[3] 1 Beav. 482, *n.*

purposes altogether illegal, or which altogether fail, the next of kin takes it, as in the case of an intestacy, as undisposed of. If a testator devises land for purposes which are in part illegal, or which partially fail, or which require part only of the lands devised, the heir takes so much of the land as is undisposed of, and which was destined for the purpose which by law cannot, or in fact does not, take effect, and so much as is not required for the purposes of the will, and this whether the land be actually sold or not. But here, it is said, the analogy between the cases of land and money ceases, and that if a testator directs money to be laid out in the purchase of land for purposes which are partly illegal or which partially fail, the next of kin has no such interest in the money as cannot be applied to the purposes of the will; but if there are purposes legal and feasible which require the investment, the next of kin are excluded. And why are they to be so excluded? . . . . In deciding in favour of the next of kin, I am following the principle of *Ackroyd* v. *Smithson*, and maintaining that uniformity of decision as to the conversion of land into money, and of money into land, which was supposed to exist before that time."

The principle of *Ackroyd* v. *Smithson* applied to cases of money to be converted into land.

Undisposed-of personalty results to representatives of testator as personalty.

So far the analogy between cases of conversion of land into money, and of money into land is complete. Here, however, the analogy ceases. As to the question —in what character the undisposed-of personalty to be converted comes into the hands of the personal representative of the testator, whether in analogy to the decision in *Smith* v. *Claxton*, he will take it as realty, or whether he will take it in its original character of personalty, the case of *Reynolds* v. *Godlee*,[1] has decided that the latter is the true view—that personalty directed by will to be laid out in land to be held in trusts, which do not exhaust the absolute interest,

[1] 1 Johnson 536, 583.

devolves, after the expiration of the specified trusts, upon the executors of the testator, as personalty for the next of kin. "It is urged," said Wood, V-C., "that the analogy of *Wright* v. *Wright* and *Smith* v. *Claxton*, must be applied completely, so as to make this real estate in the hands of the next of kin. But there is a great difference between realty and personalty in this respect. It is not the next of kin at all, but the executors on whom personal property devolves, until the purposes of the will are satisfied. . . . . The executor is in general the only person who can stand here to claim the personal estate, and whatever he gets in *quâ* executor, he must hold as personalty."

Because it first goes to the executors as personalty.

It was decided in *Jessopp* v. *Watson*,[1] that the blending of the proceeds of the real with the personal estate, for an express purpose which fails, will not operate to convert the real into personal estate for a purpose not expressed; viz., to give it to the next of kin. This rule received a strong application in *Fitch* v. *Weber*.[2] There the testatrix devised and bequeathed her real and personal estate in trust, as to the real estate for sale, as soon after her decease as could be, and declared that the trustees should stand possessed of the proceeds of the sale, as a fund of personal and not of real estate, for which purpose such proceeds or any part thereof should not in any case lapse or result for the benefit of the heir-at-law; and after giving legacies, the testatrix directed her trustees to pay and apply the residue of her estate and effects, as she should by any codicil to her will direct or appoint. The testatrix made no codicil. It was held that the heir-at-law was entitled to the proceeds of the real estate undisposed of—that the mere intention to exclude the heir was of no avail, unless there was a gift over on failure of the purposes, to some one else—that the purpose for which the testatrix said she ex-

Blending of real and personal estate.

Heir-at-law not excluded unless by a devise over.

[1] 1 My. & K. 667. [2] 6 Hare 145.

cluded the heir, was simply that the realty might be made a fund of personalty, which purpose would not *per se* be sufficient to disinherit the heir except for the purposes of the will.

Conversion for purposes of will, or out and out.

The several cases on the subject seem to depend on this question, "whether the testator meant to give the produce of the real estate the quality of personalty to *all intents*, or only so far as respected the particular purposes of the will; for unless the testator has sufficiently declared his intention not only that the realty shall be converted into personalty for the *purposes of the will*, but further, that the produce of the real estate shall be taken as personalty, whether such purposes take effect or not, so much of the real estate or produce thereof as is not effectually disposed of by the will at the time of the testator's death (whether from the silence or inefficiency of the will itself, or from subsequent lapse) will result to the heir. But every conversion, however absolute in its terms, will be deemed a conversion for the purposes of the will only, unless the testator distinctly indicates an intention that it is, on the failure of those purposes, to prevail as between the persons on whom the law casts the real and personal property of an intestate, namely, the heir and next of kin."[1]

II. Cases under settlements.

II. Cases under settlements or other instruments *inter vivos*.

(*a.*) Of land into money.
(*b.*) Of money into land.

In both these cases, one general rule is applicable. When, by an instrument *inter vivos*, realty is directed

[1] Mr Cox's note to *Cruse* v. *Barley*, 3 P. Wms. 22; 1 Jarman on Wills, 530, 2d ed.; *Amphlett* v. *Parke*, 2 Russ. & My. 221; *Taylor* v. *Taylor*, 3 De G. M. & G. 190; *Robinson* v. *Governors of London Hospital*, 10 Hare 19; *Barrs* v. *Fewkes*, 13 W. R. 987.

to be converted into personalty,[1] or personalty into realty,[2] for certain specified purposes or objects, and a *part* of those purposes or objects fail, the property to that extent results to the settlor, and through him, in the one case to his personal representatives,[3] and in the other to his heir,[4] not in its original form, but in the form into which he has directed it to be converted.

Property results to settlor in converted form.

It will be seen, therefore, that there is a material distinction as to the application of the doctrine of resulting trusts between those cases where conversion partially fails, when it is directed by will, and when it is directed by deed. In the case of conversion directed by will, if there has been any partial failure of the purposes for which the conversion has been directed, to that extent it will result to the testator's representatives, real or personal, who would have been entitled to take it had no conversion been directed.

Distinction between partial failure under a will and under a settlement.

The reason of this distinction, as has already been pointed out, is, that whereas a will comes into operation from the death of the testator, a deed takes effect in the *settlor's* lifetime, from the moment of its delivery. A simple illustration will suffice to set the rules on this subject in the clearest light. Suppose a conveyance of real estate by deed upon trust to pay the rents and profits to the settlor during his life, and after his death to sell the same and divide the proceeds between A. and B. equally, if then living. Afterwards A. dies before the time when his share becomes due, *i.e.*, before the settlor's death. As to his moiety there is a failure. Who takes it? Clearly the settlor, who is still alive, and to whom it must therefore result; but in what form? Here steps in the principle, that a deed for the purposes of conver-

[1] *Clarke* v. *Franklin*, 4 K. & J. 263.

[2] See *Pulteney* v. *Darlington*, 1 Bro. Ch. Ca. 223; *Lechmere* v. *Lechmere*, Ca. temp. Talb. 80.

[3] *Griffith* v. *Ricketts*, 7 Hare 299.

[4] *Wheldale* v. *Partridge*, 8 Ves. 236.

sion operates from the moment of its delivery, even though the settlor has directed the sale to take place after his death. The deed, therefore, has converted the realty in the lifetime of the author of the deed. "Whatever be the time at which that conversion is directed to take place, whether in the grantor's lifetime or after his death, the grantor by executing a deed of this description, says, in effect, 'From the time I put my hand to this deed, I limit so much of this property to myself as personal property.'"[1] The property results into the hands of the settlor, not as realty, but in that form into which he has directed it to be converted, *i.e.*, personalty.[2]

[1] *Clarke* v. *Franklin*, 4 K. & J. 263. [2] Ibid.

CHAPTER X.

RECONVERSION.

RECONVERSION may be defined as that notional or imaginary process by which a prior constructive conversion is annulled and taken away, and the converted property restored in contemplation of a court of equity to its original actual quality. Thus real estate is devised on trust to sell and pay the proceeds to A.; by virtue of the direction, A. becomes absolutely entitled from the moment of the testator's death to the property as personalty, whether an actual sale has taken place or not. But A. has a right to elect in what form he will take the property. He has a right to tell the trustees, "I prefer the land instead of the purchase-money of the land." And according to his election the property will vest in him, as land or money. Reconversion.

The cases on this subject range themselves under two heads;—reconversion may take place.

I. By act of parties.
II. By operation of law.

I. Reconversion by act of parties. I. By act of parties.

(A.) Who may and who may not elect, so as to reconvert.

1. It is clear that an absolute owner of property directed to be converted, where that property is outstanding, and the owner has not reduced it into pos- 1. By absolute owner.

session, may elect to take that property in whatever form he chooses. For since "equity, like nature, will do nothing in vain," if the person in whose favour the conversion is directed elects to have the property in its unconverted state, it will be vain for equity to compel the doing of that which may be undone the next moment. But as the presumption is, that what ought to be done will be done—that conversion will take place—the onus of proof will be on those who allege that the owner has reconverted the property.[1]

2. By owner of an undivided share.

2. So far the law is clear when the person entitled either to the money to be laid out in land, or to the land to be sold for money, is the absolute owner in possession. But what is the principle when he is entitled, not to the whole subject-matter, but only to an undivided share?

Of money to be turned into land.

(*a.*) Of money into land. In *Seeley* v. *Jago*,[2] A. devised £1000 to be laid out in the purchase of lands in fee for the benefit of A., B., and C., *equally to be divided*. A. dies leaving an infant heir, and B. and C., together with the infant heir, bring a bill for the £1000. The Lord Chancellor said, "The money being directed to be laid out in land for A., B., and C. *equally*, which makes them tenants in common, and B. and C. electing to have their two-thirds in money, let it be paid to them, for it is vain to lay out this money in land for B. and C., when the next moment they may turn it into money, and equity, like nature, will do nothing in vain."

Of land to be converted into money.

(*b.*) Land to be turned into money. In *Halloway* v. *Radcliffe*,[3] A. B. was entitled to two-thirds of an estate directed to be converted into personalty. Held

[1] *Sisson* v. *Giles*, 11 W. R. 971; *Benson* v. *Benson*, 1. P. Wms. 130.
[2] 1 P. Wms. 389.
[3] 23 Beav. 163.

that it had not been reconverted into realty by acts of A. B., done independently of the person entitled to the remaining one-third. Here the principle is clear. The sale of an undivided share would obviously be less marketable, and produce a far less sum than would be receivable in respect of that share of the proceeds of sale of the entirety; and therefore neither has a right to compel the other to forego a sale of the whole property.

3. A remainder-man cannot elect so as to affect the interests of the owners of prior estates. Take, for instance, the simple case of a settlement of money to be laid out in land upon a tenant for life, remainder in fee. There is no principle, whether in law or equity, by which the remainder-man in fee can, as against the tenant for life, elect to take the property as money The tenant for life can insist on his rights under the settlement, and can compel the trustees of the settlement to lay out the money as directed by the settlement. But although, as against the tenant for life, the remainder-man has no right to say that the money to be laid out in land shall again become money—shall be reconverted—of course, there is nothing to prevent a remainder-man declaring, as between his real and personal representatives, who claim as volunteers under him, that a particular reversionary interest to which he is entitled, shall be money or land.[1] 3. By remainder-man.

4. An infant cannot ordinarily elect.[2] 4. By infants.

5. A lunatic cannot elect.[3] 5. By lunatics.

[1] 2 Sp. 271; *Triquet* v. *Thornton*, 13 Ves. 345; *Gillies* v. *Longlands*, 4 De G. &. Sm. 372, 379; *Cookson* v. *Cookson*, 12 Cl. & F. 121.

[2] *Seeley* v. *Jago*, 1 P. W. 389; *Carr* v. *Ellison*, 2 Bro. C. C. 56; *Dyer* v. *Dyer*, 13 W. R. 732; *Robinson* v. *Robinson*, 19 Beav. 494.

[3] *Ashby* v. *Palmer*, 1 Mer. 296.

6. By married women.

6. The rules as to the capability of married women to elect demand a particular consideration.

Money into land.

(*a.*) As to money to be converted into land.

A *feme covert* cannot elect by a contract or ordinary deed.[1] But although, as observed by Lord Hardwicke in *Oldham* v. *Hughes*,[2] "a *feme covert* cannot alter the nature of *money* to be laid out in land, *barely* by a contract or deed, for to alter the property of it, or course of descent, this money must be invested in land (and sometimes sham purchases have been made for that purpose), and she may then levy a fine of the land and give it to her husband, or anybody else. There is a way, also, of doing this without laying the money out in land, and that is by coming into this court, whereby the wife may consent to take this money as personal estate; and upon her being present in court, and being examined (as a *feme covert* on a fine is) as to such consent, it binds this money articled to be laid out in land as much as a fine at law would the land, and she may dispose of it to the husband, or anybody else; and the reason of it is, that at law money so articled to be laid out in land is considered barely as money till an actual investiture, and the equity of this court alone views it in the light of a real estate; and, therefore, this court can act upon its own creature, and do what a fine at common law can upon land, and if the wife has craved aid of this court, in the manner I have mentioned, she might have changed the nature of this money which is realised; but she cannot do it by deed."

3 & 4 Will. IV., c. 74, s. 77.

The necessity of making these sham purchases caused much inconvenience, which was attempted to be remedied by several statutes. Finally, by 3 & 4 Will. IV., c. 74, s. 77, a married woman was permitted

[1] *Frank* v. *Frank*, 3 My. & Cr. 171.

[2] 2 Atk. 453.

by deed executed in compliance with its provisions to make her election to take or dispose of money to be laid out in land.[1]

(*b.*) Land to be converted into money. Land into money.

Here the husband and wife might, before the stat. 3 & 4 Will. IV., c. 74, so long as the land remained unsold, by levying a fine, bar all the wife's estates and interest in the money to arise from the sale of the land.[2] Such was the state of the old law; and under the act for the abolition of fines and recoveries, the result is the same. That act in substance says,[3] that a married woman may, with her husband's concurrence, by deed acknowledged under the act dispose of lands, or of money subjected to be invested in lands, and also, of "any interest in land, either at law or equity, or any charge, lien, or encumbrance in, or upon, or affecting land, either at law or in equity." In *Briggs* v. *Chamberlain*,[4] it was decided that where the personal estate consists of moneys to arise from the sale of lands, she might bind her interest by a deed acknowledged, the subject-matter of disposition, being then an interest in land, and falling, therefore, within the words of the statute.[5]

(B.) Mode in which election to take the property in its actual state may be made. How election is shown.

Of course it is clear that an express declaration of intention on the part of the absolute owner of property that it shall be deemed real or personal estate is *per se* sufficient to bind those claiming under him, without any reference to the actual state or con- Express direction.

[1] *Forbes* v. *Adams*, 9 Sim. 462.
[2] Co. Litt. 121 *a. n.*; *May* v. *Roper*, 4 Sim. 360.
[3] Sec. 77.
[4] 11 Hare 69.
[5] *Tuer* v. *Turner*, 20 Beav. 560.

dition of the property at the time, though it has been doubted whether a declaration by parol be sufficient.[1]

But much greater difficulty arises where the owner does not express his intention so to reconvert; the question will then occur, what acts of the owner are sufficient to lead to an inference that he desired and intended to possess the property according to its actual state and condition.

As to land into money.

(*a.*) As to real estate directed to be converted into money, slight circumstances are sufficient to raise a presumption that the owner has elected to retain it as realty. Thus if a person keeps land unsold for a long time, a presumption will arise that he has elected to take it as land.[2] So the circumstance of granting a lease, reserving rent to the party entitled, her heirs, and assigns, was strong evidence of the intention of the grantor to elect that it should continue as land.[3] In *Davies* v. *Ashford*,[4] by marriage settlement real estates were conveyed to trustees on trust, to sell, and hold the proceeds on trust for the husband and wife, for their lives successively, remainder on trust for their children, remainder on trust for the survivor of husband and wife absolutely. There was no issue. The husband survived his wife, and after her death consulted his solicitor as to his rights under the settlement, and then got possession of the settlement and title-deeds, &c., and remained in possession of them until his death, and also of the estates. Held, that he had elected to take the estates as land. The V.-C. of England said, "It does not distinctly appear in whose custody the title-deeds originally were, but it

[1] *Bradish* v. *Gee*, Amb. 229; but see *Challoner* v. *Butcher*, cited 3 Atk. 685; *Pulteney* v. *Darlington*, 1 Bro. C. C. 237; *Wheldale* v. *Partridge*, 8 Ves. 236; 1 W. & T. 780.

[2] *Dixon* v. *Gayfere*, 17 Beav. 433; *Griesbach* v. *Fremantle*, 17 Beav. 314; *Kirkman* v. *Miles*, 13 Ves. 338.

[3] *Crabtree* v. *Bramble*, 3 Atk. 680.

[4] 15 Sim. 42.

is clear that there was a change in the possession of them, and that Mr Davies got them into his custody. Now, was not that of necessity a destruction of the trust? For the trustees could not have compelled Mr Davies to deliver up the deeds; and without doing so they could not have made an effectual sale of the estate."

(*b.*) As regards personal estate to be laid out in land, of course, if the person absolutely entitled receives the money from the trustees, he is held to have elected to take it as money, and the trust is at an end.[1] But it will not be so deemed where he has received the income, though for a long time.[2] Money into land.

II. Reconversion by operation of law. II. By operation of law.

If an instrument is to be taken to impress a fund with real qualities, the money being once clearly impressed with real uses, as land, in a contest between the heir and executor, the impression will remain for the benefit of the heir; and to put an end to that impression, it must be shown that the money was in the hands, *i.e.*, in the actual possession, of a person who had in himself both the executors and the heirs; he must not only have the *jus in re*, but no other person must have any outstanding *jus ad rem*.[3] In this case, if he makes no declaration of intention respecting it, it shall go according to the quality in which it was left by him at his death. Here it is important to observe that the onus of proof seems to lie on those who deny reconversion, whereas in the case of reconversion by parties, it was pointed out that the onus lay on those who alleged reconversion. Money at home.

[1] *Trafford* v. *Boehm*, 3 Atk. 440; *Rook* v. *Worth*, 1 Ves. 461; *Cookson* v. *Cookson*, 12 Cl. & F. 147.

[2] *Gillics* v. *Longlands*, 4 De G. & Sm. 372; *Re Pedder's Settlement*, 5 De G. M. & G. 890.

[3] *Wheldale* v. *Partridge*, 8 Ves. 235.

In *Chichester* v. *Bickerstaff*,[1] on the marriage of Sir John Chichester with the daughter of Sir Charles Bickerstaff, Sir Charles by articles covenanted to pay £1500 in part of the portion, which, together with £1500 to be advanced by Sir John within three years after the marriage, was to be invested in land, and settled on Sir John for life, his intended wife for life, remainder to their issue, remainder to Sir John's right heirs. Within a year of the marriage the wife died childless, and Sir John *three days after* his wife. Sir John by his will made Sir Charles his *executor*, and devised the residue of his personalty, after debts, &c., paid, to Frances Chichester, his sister. The heir-at-law of Sir John filed a bill against Sir Charles to compel him to pay the £1500 which Sir John had covenanted to pay, insisting that by virtue of the marriage articles, the money ought to be looked on and considered in equity as land, and therefore belonged to him as heir. But Lord Somers said, "This money, though once bound by the articles, yet, when the wife died without issue, became free again, as the land would likewise have been in case a purchase had been made pursuant to the articles, and therefore would have been assets to a creditor, and must have gone to the executor or administrator of Sir John; and the case is much stronger where there is a residuary legatee," and therefore dismissed the bill.

In the case of *Pulteney* v. *Darlington*,[2] money impressed with the qualities of realty had come by operation of law into the hands of the person (Lord Bath) solely entitled to it under the limitation in fee; and the person so entitled, without taking notice of the particular sum, devised all his manors, &c., which he was seised or possessed of, or to which he was in any wise entitled in possession, reversion, or remainder, or

[1] 2 Vern. 295. [2] 1 Bro. C. C. 223.

which should thereafter be purchased with any trust moneys (except certain estates therein mentioned) to his brother H. in fee, and gave him all the residue of his personal estate, and made him his executor. His brother H. subsequently, by his will, gave all his estates by local descriptions to certain uses therein mentioned, and all his money, securities for money, goods, chattels, and personal estate, not before disposed of, to his executors, for certain trusts mentioned in his will. The bill brought by the heir at-law to have the money laid out in land was dismissed. "If," said Lord Thurlow, "A. B. has in his possession £20,000 to be laid out in land for his use, he has nobody to sue; the right and the thing centering in one person, the action is extinguished;" and after citing and commenting upon the cases on the subject, his lordship added, "The use I make of these cases, notwithstanding the dicta they contain, is this, that where a sum of money is in the hands of one without any other use but for himself it will be money, and the heir cannot claim. . . . . But whether this is clearly so or not, circumstances of demeanour in the person (even though slight) will be sufficient to decide it; a very little would do, receiving it from the trustees, there is no doubt, would be sufficient. Lord Bath did receive it, he had it in his hands." This decision was affirmed in the House of Lords;[1] and, as Lord Eldon says, "went no further than this, that if the property was *at home*, in the possession of the person under whom they claimed as heir and executor, the heir could not take it, but if it stood out in a third person he might; and the question in that cause was not upon the equity between the heir and executor, but whether the money was at home.[2]

Money impressed with real uses *at home* in the hands of the absolute owner descends as money.

But not if it be outstanding in hands of a third party.

[1] 7 Bro. P. C. Toml. Ed. 530.

[2] *Wheldale* v. *Partridge*, 8 Ves. 235.

CHAPTER XI.

ELECTION.

Election arises from inconsistent or alternative gifts.

THE doctrine of election originates in inconsistent or alternative donations; a plurality of gifts with intention, express or implied, that one shall be a substitute for the rest. In the judgment of tribunals, therefore, whose decision is regulated by that intention, the donee will be entitled, not to both benefits, but the choice of either. The second gift is designed to be effectual only in the event of his declining the first; and the substance of the gifts combined is an option.

If the individual, to whom, by an instrument of donation, a benefit is offered, possesses a previous claim on the author of the instrument, and an intention appears that he shall not both receive the benefit and enforce the claim, the same principle of executing the purpose of the donor, requires the donee to elect between his original and his substituted rights; the gift being designed as a satisfaction of the claim, he cannot accept the former without renouncing the latter.[1]

A new modification of the doctrine arises on the occurrence of gifts of a peculiar nature. The owner of an estate, having, in an instrument of donation, applied to the property of another expressions which, were that property his own, would amount to an effectual disposition of it to a third person, and having, by the same instrument, disposed of a portion of his estate in favour of the proprietor whose rights he

[1] See *post* on the Doctrine of Satisfaction.

assumed, is understood to impose on that proprietor the obligation of either relinquishing (to the extent at least of indemnifying those whom, by defeating the intended disposition, he disappoints) the benefit conferred on him by the instrument, if he asserts his own inconsistent proprietary rights; or, if he accepts that benefit, of completing the intended disposition by the conveyance, in conformity to it, of that portion of his property which it purports to effect. The *foundation* of the doctrine is still the intention of the author of the instrument; an intention which, extending to the whole disposition, is frustrated by the failure of any part; and its *characteristic*, in its application to these cases is, that, by an equitable arrangement, effect is given to a donation of that which is not the property of the donor; a valid gift in terms absolute, being qualified by reference to a distinct clause, which, though inoperative as a conveyance, affords authentic evidence of intention. The intention being assumed, the conscience of the donee is affected by the condition, though destitute of legal validity, not express but implied, annexed to the benefit proposed to him. To accept the benefit while he declines the burden is to defraud the design of the donor.[1] To illustrate the doctrine of election, suppose A. by *will* or *deed* gives to B. property belonging to C., and by the *same* instrument, gives other property belonging to himself to C., a court of equity will hold C. to be entitled to the gift made to him by A., only upon the implied condition of his conforming with all the provisions of the instrument, by renouncing the right to his own property in favour of B.; he must consequently make his choice, or, as it is technically termed, he is put to his election, to take either under or against the instrument.

Intention of testator to be followed.

The doctrine of election, in common with many

[1] Note to *Dillon* v. *Parker*, 1 Sw. 395.

Derived from the civil law.

other doctrines of our courts of equity, appears to be derived from the civil law. In that system, a bequest of property which the testator knew to belong to another was not void. But a bequest on the erroneous supposition that the subject belonged to the testator, was, it seems, invalid. In the latter respect, the Roman law is more logically consistent than our own. For, by the English law, whether the donor knew that the property he assumed to deal with was not his own, and yet he advisedly assumed to give it, or whether he gave it erroneously, supposing it to be his own, in either case it is held that the donee is put to his election.[1] To return; in the case already put, of A. giving to B. property belonging to C., and by the same instrument giving to C. other property belonging to himself, C. has two courses open to him—

Election under instrument.

1st. He may elect to take under, and consequently to conform to all the provisions of, the instrument. Here no difficulty arises, as B. will take C.'s property, and C. will take the property given to him by A.

Election against the instrument.

2nd. He may elect against the instrument. The question then arises, Does C., by refusing to conform to the terms of the instrument, wholly forfeit his claim to any benefits intended to be conferred on him by that instrument, or does he forfeit only so much of the benefits under the instrument, as is necessary to compensate B. for the disappointment he has suffered by C.'s election against the instrument? To illustrate, by a simple case. Suppose A., the testator, gives to B., a family estate belonging to C., worth £20,000 in the market, and by the same will gives to C. a legacy of £30,000 of his own property. C. is unwilling to part with his family estate, and therefore elects to take against the instrument. It has been held, that, in the

[1] *Whistler* v. *Webster*, 2 Ves. Jr. 370.

case of election against the instrument, the principle of compensation, rather than that of forfeiture, is to govern. In the case put, therefore, C. will retain the estate and receive £10,000 of his legacy of £30,000, leaving to B. £20,000 to compensate him for the value of the estate of which he has been disappointed by C.'s election against the instrument. The conclusion from all the cases is thus summed up in Mr Swanston's note to *Gretton* v. *Haward*.[1]

Compensation and not forfeiture.

1st. That in the event of election to take against the instrument, courts of equity assume jurisdiction to sequester the benefits intended for the refractory donee, in order to secure compensation to those whom his election disappoints.

Rules.

2nd. That the surplus, after compensation, does not devolve, as undisposed of, but is restored to the donee, the purpose being satisfied for which alone the court controlled his legal right.

It may be useful to warn the student carefully to discriminate this class of cases where a person disposes of that which is *not his own*, and confers on the real owner of that property some other benefits, from another apparently similar class of cases, where a testator makes two or more separate devises or bequests of his own property in the same instrument. In this latter case, the gifts, whether beneficial or onerous, being the property of the donor, the donee may take what is beneficial and reject what is onerous, unless it appear on the will that it was the intention of the testator to make the acceptance of the burden a condition of the benefit.[2]

Cases where testator makes two bequests of his own in same instrument.

As the doctrine of election depends on the principle of compensation, it follows that it will not be applicable unless there be a fund from which compensation can

There must be a fund from which compensation can be made.

[1] 1 Swanst. 433.

[2] *Warren* v. *Rudall*, 1 J. & H. 13.

be made. Thus, it was held in *Bristowe* v. *Warde*,[1] that where, under a power to appoint to children, the father made an appointment improperly, any child entitled, in default of appointment, might set it aside, although a specific share was appointed to him. "The doctrine of election," said the Lord Chancellor, "never can be applied but where, if an election is made contrary to the will, the interest that would pass by the will can be laid hold of to compensate for what is taken away; therefore, in all cases, there must be some free disposable property given to the person, which can be made a compensation for what the testator takes away. That cannot apply to this case where no part of his property is comprised in the will but that which he had power to distribute. Thus, again, *In re Fowler's Trust*,[2] a testator had an exclusive power of appointment over an *estate* to his children and grand-children; and an exclusive power to appoint a *fund* among his children only. He appointed the estate to some of his children and the fund to his children and a grandchild (who was not an object). Held, that this was not a case of election, and that the children were not compellable to elect, either to give effect to the appointment of the fund to the grandchild, or reject the benefits appointed under the first power. If, however, in these cases the testator had also given property absolutely his own to the objects of the power, a case of election would have arisen, and compensation might have been claimed out of such property.

Election under powers.

Cases of election under the execution of powers.

As to person entitled in default of appointment.

(*a.*) Where, under a special power, an express appointment is made to a stranger to the power, which is therefore void, and a benefit is conferred by the same instrument, upon a person entitled, in default of appointment, the latter will be put to his election. Thus, "where a man having a power to appoint to A.

[1] 2 Ves. Jr. 336. [2] 27 Beav. 362.

a fund which, in default of appointment, is given to B., exercises the power in favour of C., and gives other benefits to B., although the execution is merely void, yet if B. will accept the gifts to him, he must convey the estate to C., according to the appointment."

As to person entitled under the power.

It has been said that where the donee of a power by the same instrument appoints to a stranger, and confers benefits out of his own property upon an object of the power, the latter will be put to his election.[1] But it is submitted that in such a case the person who is the object of the power can not be put to his election, and for the following reasons. In order to raise a case of election, two essential circumstances must concur:—

Circumstances essential to an election.

1st. That property which belongs to one person (A.) must be given to another person by the testator.

2nd. That the testator at the same time gives A. property of his (the testator's). In such a case, A. would be put to his election.

Suppose, then, that A. is the object of the power, B., the person entitled in default of appointment to A., and X. is the person in whose favour the appointment is actually made. The appointment in favour of X. is clearly a bad appointment, and therefore the property would pass to B. as in default of appointment, and if the testator has conferred any benefits on B., he (B.) will be put to his election. But no property which *belongs to* A. has been given to X.; for A. is but a volunteer as regards the donee of the power, and until the donee has exercised his power over the fund, in favour of A., it is not his property; therefore, it is clear that an essential element to raise election as against A. is wanting. None of A.'s pro-

[1] *Blacket* v. *Lamb*, 14 Beav. 482; 1 L. C. 320.

perty has been given to another. But if A. had combined in himself both the character of the object of the power, and the person entitled to the fund in default (*i.e.*, if in the case put, A. and B. were the same individual), he would, if he had received any benefits from the donee of the power, be put to his election, not as A., the object of the power, but as *the person* (B.) *entitled, in default of appointment.*[1]

Absolute appointment, with directions modifying the appointment.

(*b.*) It has been recently decided "that where there is an absolute appointment by will in favour of a proper object of the power, and that appointment is followed by attempts to modify the interest so appointed, in a manner which the law will not allow, the court reads the will as if all the passages in which such attempts are made were swept out of it, for all intents and purposes;" *i.e.*, not only so far as they attempt to regulate the quantum of interest to be enjoyed by the appointee in the settled property, but also so far as they might otherwise have been relied upon as raising a case of election.[2] The reason of the rule may be shortly stated in the words of the Master of the Rolls in *Blacket* v. *Lamb*,[3] "The superadded words used by the testator here, neither are, nor profess to be any appointment over the fund itself, but they purport to raise an obligation on the conscience of the person taking the benefit of the gift, to transfer that benefit, after his decease to his children. I am of opinion, that if the words had been used by the testator with reference to a fund which was wholly within his own control, to deal with *as he might think fit*, these words would have created a trust, and that his children, taking the gifts under the will of the testator, would have taken them charged with the duty of disposing of them according to that will; or, in other words,

[1] *Whistler* v. *Webster*, 2 Ves. Jr. 367. And see the judgment of James, V.-C., in *Wollaston* v. *King*, L. R. 8 Eq. 165.

[2] *Woolridge* v. *Woolridge*, 1 Johns 63.

[3] 14 Beav. 482.

that a trust would have been created by implication in favour of the objects mentioned in the words of the gift, the execution of which this court would have enforced;" and this rule will be the more readily adopted where the superadded clause is an attempt to evade the law as to perpetuities.[1]

It would seem, however, that where there is a clause of forfeiture of the legacies on non-compliance with such direction, a case of election would be raised.[2]

Ineffectual attempt to dispose of property by will.

Questions of election have also arisen, where a testator attempted to dispose of his own property by an instrument ineffectual for that purpose.

(*a.*) Infancy.—No case of election will be raised where there is a want of capacity to devise real estate by reason of infancy. Thus, under the old law, where an infant whose will was valid as to personalty, but invalid as to realty, gave a legacy to his heir-at-law, and devised real estate to another person, the heir-at-law would not have been obliged to elect between the legacy and the real estate, which descended to him in consequence of the invalidity of the devise: he might take both.[3]

Coverture.

(*b.*) Coverture.—Nor will a case of election arise if there is a want of capacity to make a will arising from coverture. Thus, where a *feme covert* made a valid appointment by will to her husband, under a power, and also bequeathed to another person personal estate, to which the power did not extend, the husband was not put to his election, but was held to be entitled to the benefit conferred on him by the power, and also to the property bequeathed by his wife, to which he was

[1] *Wollaston* v. *King*, L. R. 8 Eq. 165.

[2] *King* v. *King*, 15 Ir. Ch. R. 479; *Boughton* v. *Boughton*, 2 Ves. Sr. 12.

[3] *Hearle* v. *Greenbank* 3 Atk. 695, 1 Ves. Sr. 298; 1 Vict., c. 26, s. 7.

entitled *jure mariti*.[1] And the rule is the same where the will is valid at the time of execution, but afterwards becomes inoperative.[2]

Wills before 1 Vict., c. 26.

(*c*.) Previous to the Wills Act, 1 Vict., c. 26, where a testator, by a will not properly attested for the devise of freeholds, but sufficient to pass personal estate, devised freehold estates away from the heir, and gave him a legacy, the question has arisen whether the heir-at-law was not obliged to elect between the freehold estate, which descended to him in consequence of the devise to him being inoperative, and the legacy; it is clearly settled that he would not be obliged to elect[3] unless the legacy were given to him with an express condition that if he disputed, or did not comply with the whole of the will, he should forfeit all benefit under it.[4] These questions will not arise under wills coming within the Wills Act, because if they are sufficiently attested for the bequest of a personal legacy, they will also pass freehold estates.

Election with reference to dower.

A widow may at law be put to her election by express words between her dower and a gift conferred on her.[5] In equity she may be put to her election between dower, and a gift conferred on her, by manifest implication, demonstrating the intention of the donor to exclude her from her legal right to dower; and this intention will be implied if the instrument contains provisions inconsistent with the assertion of her right to dower. The question then arises, what is a gift inconsistent with her assertion of that right. It has been long settled that a devise, by a testator to his widow, of *part* of the lands of which she is dowable, is not inconsistent with her claim to dower out of the

What is inconsistent with widow's right to dower.

[1] *Rich* v. *Cockell*, 9 Ves. 369.
[2] *Blaiklock* v. *Grindle*, L. R. 7 Eq. 215.
[3] *Sheddon* v. *Goodrich*, 8 Ves. 481.
[4] *Boughton* v. *Boughton*, 2 Ves. Sr. 12.
[5] *Nottley* v. *Palmer*, 2 Drew. 93.

remainder.[1] A devise of lands out of which the widow is dowable, on *trust for sale*, is not inconsistent with her claim to dower out of those lands, even though the interest of a part of the proceeds of the sale is given her;[2] nor will a mere gift of an annuity to the testator's widow, although charged on all the testator's property, exclude her right to dower.[3]

The provisions which have generally been held inconsistent with the widow's legal right to dower, are those which prescribe to the devisees a certain mode of enjoyment, which shows the testator's intention that they should have the entirety of the property. Thus, in *Butcher* v. *Kemp*,[4] where the testator, having devised a freehold farm, containing about 136 acres, to trustees and their heirs, during the minority of his daughter, directed them *to carry on the business of the farm, or let it on lease, during the daughter's minority*, and the testator devised some lands to his widow for her life, and also gave her specific and pecuniary legacies, it was held that the widow was put to her election. Sir John Leach, V.-C., said, "His plain intention is that the trustees should, for the benefit of his daughter, have authority to continue his business in the entire farm which he himself occupied, consisting of about 136 acres, and this intention must be disappointed if the widow could have assigned to her a third part of this land."[5]

Immaterial whether testator knew or did not know property not to be his own.

In order to raise a case of election, it has already been shown that there must appear on the will or instrument itself, a clear intention on the part of the author of it, to dispose of that which is not his own, and it is immaterial whether he knew the property not

[1] *Lawrence* v. *Lawrence*, 2 Vern. 365.
[2] *Ellis* v. *Lewis*, 3 Hare 310.
[3] *Holdich* v. *Holdich*, 2 Y. & C. C. C. 19.
[4] 5 Mad. 61.
[5] *Miall* v. *Brain*, 4 Mad. 119; *Birmingham* v. *Kirwan*, 2 S. & L. 444.

to be his own, or by mistake conceived it to be his own; for in either case, if the intention to dispose of it appears clearly, his disposition will be sufficient to raise a case of election.[1] The cases are clear where the testator devises an estate in which he has no interest at law; but an element of much greater complication is introduced where the testator has a limited interest in the property dealt with. Where the testator has some interest, the court will lean, as far as possible, to a construction which would make him deal only with that to which he is entitled, and not with that over which he has no disposing power, inasmuch as every testator must, *primâ facie*, be taken to "have intended to dispose only of what he had power to dispose of; and, in order to raise a case of election, it must be clear that there was an intention on the part of the testator to dispose of what he had not the right or power to dispose of."[2]

Testator is presumed to have given his own.

Thus, in *Shuttleworth* v. *Greaves*,[3] the wife of F. S. was the only child of A., who was entitled to certain shares in the Nottingham canal, which, upon A.'s death, were transferred into the names of "F. S. and wife," the wife having been her father's administratrix. F. S. was afterwards, until his death, treated by the canal company as proprietor of the shares, and received the dividends upon them, and was elected to be and acted as a member of a committee, which, by the Company's Act of Parliament, was required to consist of proprietors of two or more shares. F. S. by his will bequeathed what he called "all my shares in the Nottingham Canal Navigation," and all his personal estate to trustees, in trust for his wife for life, remainder over to his brothers and sisters absolutely. The testator had no canal shares at all,

[1] *Stephens* v. *Stephens*, 1 De G. & J. 62; *Welby* v. *Welby*, 2 V. & B. 199.

[2] *Wintour* v. *Clifton*, 8 De G. M. & G. 651.

[3] 4 My. & Cr. 35.

unless those so transferred into the names of his wife and himself should be considered his. Held, that the words of the will amounted to a bequest of the particular shares before mentioned, and that the widow was bound to elect.

In *Dummer* v. *Pitcher*,[1] by the testator's will "he bequeathed the rents of his leasehold houses, and the interest of all his funded property or estate" upon trust for his wife, for life, and after her decease, on trust, to pay divers legacies of stock. The testator had, in fact, no funded property at the date of his will; but there was funded property standing in the joint names of himself and of his wife. After his death, the wife claimed, by survivorship, the funded property standing in the names of her husband and herself—it was contended that as she took benefits under the will, that she ought to be put to her election between those benefits, and the funded property. It was held, however, that the widow ought not to be put to her election—that although the testator had no funded property of his own at the date of the will, "that there was nothing here to make it clear that the testator was dealing with the stock already purchased, or which should thereafter be purchased.[2]

Evidence dehors the instrument.

It is now clearly settled that parol evidence, dehors the will, is not admissible for the purpose of showing that a testator, considering property to be his own, which did not actually belong to him, intended to comprise it in a general devise or bequest. Thus, in *Clementson* v. *Gandy*,[3] where parol evidence was tendered for the purpose of showing that the testatrix intended to pass, under a general bequest, certain property in which she had only a life interest, supposing it to be her own absolutely, so as to put a legatee

[1] 2 My. & Keen. 262.
[2] See *Usticke* v. *Peters*, 4 K. & J. 437.
[3] 1 Keen. 309.

who had an interest in the property, to his election. Lord Langdale refused to admit the evidence. "I am of opinion," observed his lordship, "that this evidence cannot be admitted. It is tendered for the purpose of showing that the testatrix bequeathed property as her own which did not belong to her, and that she intended to leave a considerable residue for charitable purposes, which, by reason of that mistake, turns out to be much less than she intended; and it is argued that this raises a case of election. The intention to dispose must, in all cases, appear by the will alone. In cases which require it, the court may look at external circumstances, and consequently receive evidence of such circumstances for the purpose of ascertaining the meaning of the terms used by the testator. But parol evidence is not to be resorted to, except for the purpose of proving facts which make intelligible something in the will, which, without the aid of extrinsic evidence, cannot be understood."[1]

Persons under disabilities. Married women.

(*a.*) Married women.—Although the practice as to election by married women is somewhat fluctuating, it seems that in general an inquiry will be made as to which is most beneficial for them, and they will be required to elect within a limited time.[2] But it seems that a married woman can elect so as to affect her interest in real property, without a deed acknowledged,[3] and where she has so elected, the court can order a conveyance accordingly, the ground of such order being that no married woman shall avail herself of a fraud.[4]

Infants.

(*b.*) Infants.—With reference to infants also, the practice is not quite uniform. In *Streatfield* v. *Streat-*

[1] *Stratton* v. *Best*, 1 Ves. Jr. 285; *Smith* v. *Lyne*, 2 Y. & C. C. C. 345; *Honeywood* v. *Forster*, 30 Beav. 14.

[2] *Davis* v. *Page*, 9 Ves. 350; *Wilson* v. *Townshend*, 2 Ves. Jr. 693.

[3] 3 & 4 Will. IV., c. 74, s. 77.

[4] *Barrow* v. *Barrow*, 4 K. & J. 409; *Willoughby* v. *Middleton*, 2 J. & H. 344.

field,[1] the period of election was deferred until the infant came of age. In other cases, there has been a reference to inquire what would be most beneficial to the infant.[2]

Persons compelled to elect are entitled previously to ascertain the relative value of their own property and that conferred upon them,[3] and may file a bill to have all necessary accounts taken.[4] An election made under a mistake will not be binding, for in all cases of election, the court, while it enforces the rule of equity that the party shall not avail himself of both his claims, is anxious to secure to him the option of either, and not to hold him concluded by equivocal acts, performed, perhaps, in ignorance of the value of the funds.[5] Privileges of persons compelled to elect.

Election may be either *express*, in which case no question can arise; or it may be *implied*. And here considerable difficulty often arises in deciding what acts of acceptance or acquiescence amount to an implied election; and this question must, it seems, be determined more upon the circumstances of each particular case, than on any general principle. It would be necessary to inquire into the circumstances of the property against which the election is supposed to have been made, for, if a party, not being called on to elect, continues in the receipt of the rents and profits of both properties, such receipt cannot be construed into an election to take one and reject the other; and, in like manner, if one of the properties does not yield rent to be received, and the party liable to elect deals with it as his own, as, for instance, by mortgaging it (parti- What is deemed an election.

[1] 1 L. C. 303.
[2] *Bigland* v. *Huddleston*, 3 Bro. C. C. 285 *n.*; *Ashburnham* v. *Ashburnham*, 13 Jur. 1111.
[3] *Boynton* v. *Boynton*, 1 Bro. C. C. 445.
[4] *Buttricke* v. *Broadhurst*, 3 Bro. C. C. 88.
[5] *Wake* v. *Wake*, 3 Bro. C. C. 255; *Kidney* v. *Coussmaker*, 12 Ves. 136.

cularly if this be done with the concurrence of the party entitled to call for an election), such dealing will be unavailable to prove an actual election as against the receipt of the rent of the other property.[1] As we have before seen, any acts to be binding upon a person must be done with a knowledge of his rights. They must also be done with the intention of electing.[2]

Length of time.

It is difficult to lay down any rule as to what length of time, after acts done, by which election is usually implied, will be binding on a party, and prevent him from setting up the plea of ignorance of his rights.[3] But, on the other hand, it must be remembered that a person may by his acts suffer specific enjoyment by others until it becomes inequitable to disturb it.[4]

A person who does not elect within the time limited, will be considered as having elected to take against the instrument putting him to his election.[5]

[1] *Padbury* v. *Clark*, 2 Mac. & G. 298.

[2] *Stratford* v. *Powell*, 1 Ball. & B. 1; *Dillon* v. *Parker*, 1 Swanst. 380, 387.

[3] *Reynard* v. *Spence*, 4 Beav. 103; *Sopwith* v. *Maugham*, 30 Beav. 235.

[4] *Tibbets* v. *Tibbets*, 19 Ves. 663.

[5] Decree in *Streatfield* v. *Streatfield*, 1 Swanst. 447.

CHAPTER XII.

PERFORMANCE.

THE doctrine of performance is based upon the rule of equity, that equity will impute an intention to fulfil an obligation; that when a person covenants to do an act, and he does that which may either wholly or partially be converted to or towards a completion of the covenant, he shall be presumed to have done it with that intention.

Equity imputes an intention to fulfil an obligation.

Under this subject two classes of cases occur.

I. Where there is a covenant to purchase and settle land, and a purchase is made, not expressed to be in pursuance of such covenant, and no express settlement is made.

II. Where there is a covenant to *leave* property, and the covenantee receives a share under an intestacy.

I. The doctrine upon the first branch of this subject was fully discussed in the leading case of *Lechmere* v. *Earl of Carlisle*.[1] There, Lord Lechmere, upon his marriage with Lady Elizabeth Howard, daughter of the Earl of Carlisle, covenanted to lay out within one year after his marriage £6000, her portion, and £24,000 (amounting in the whole to £30,000) in the purchase of *freehold lands in possession*, in the south

1. Covenant to purchase land, and land is purchased.

[1] 3 Peere Wms. 211; Ca. t. Talb. 80.

part of Great Britain, with the consent of the Earl of Carlisle and the Lord Morpeth, to be settled on Lord Lechmere for life, remainder for so much as would amount to £800 a year to Lady Lechmere, for her jointure, remainder to first and other sons in tail male, remainder to Lord Lechmere, his heirs and assignees for ever; and Lord Lechmere also covenanted that until the £30,000 should be laid out in lands, interest should be paid to the persons entitled to the rents and profits of the lands when purchased. Lord Lechmere was seised of some lands in fee at the time of his marriage, and after his marriage purchased some *estates in fee* of about £500 per annum, some estates *for lives, and reversionary estates in fee* expectant on lives, and *contracted* for the purchase of some estates *in fee in possession*, and then died intestate, without issue, and without having made a settlement of any estate. None of the purchases or contracts were made by Lord Lechmere with the consent of the trustees. Upon a bill being filed by Mr Lechmere, the heir of Lord Lechmere, for specific performance of the covenant, and to have the £30,000 laid out as therein agreed; it was held by Sir J. Jekyll, M.R., that he was entitled to specific performance, and that none of the land which was permitted to descend to the heir was to be taken as satisfaction or part performance of the covenant. However, on appeal, Lord Talbot reversed his Honor's decree as to the *freehold* lands purchased *in fee simple in possession after* the covenant, though with but part of the £30,000, and left to descend; and these were ordered by the Lord Chancellor to go as satisfaction *pro tanto*, or more correctly speaking, they were to be considered as bought in part performance of the covenant. "As to questions of satisfaction," observes his lordship,[1] "where they are properly so, they have always been between debtor or creditor, or their representatives. As to Mr Lechmere, I do not consider

[1] See Sugd. Vrs. & Prs. 708–710, 14th ed.

him as a creditor, but as standing in the place of his ancestor, and thereby entitled to what would have vested in his ancestor. A constructive satisfaction depends on the intention of the party, to be collected from circumstances. But then the thing given must be of the same kind, and of the same or greater value. The reason is plain, for a man may be bountiful as well as just, and if the sum given be less than the debt, it cannot be intended as a satisfaction, but may be considered as a bounty; and if the thing given is of a different nature, then, also, as the intention of the party is not plain, it must be considered as a bounty. But I do not think the question of satisfaction properly falls within this case, for here it turns on what was the intention of my Lord Lechmere in the purchase made after the articles; for as to all the estates purchased precedent to the articles, there is no colour to say they can be intended in performance of the articles; and as to the leaseholds for life, and the reversion in fee expectant on the estates for life, it cannot be taken they were purchased in pursuance of the articles, because they could not answer the end of them. But as to the other purchases (in fee simple in possession, &c.), though considered as a satisfaction to a creditor, yet they do not answer, because they are not of equal or greater value. Yet why may they not be intended as bought by him with a view to make good the articles? The Lord Lechmere was bound to lay out the money with the liking of the trustees, but there was no obligation to lay it out all at once, nor was it hardly possible to meet with such a purchase as would exactly tally with it. Parts of the land purchased are in fee simple in possession, in the south part of Great Britain, and near to the family estate. But it is said they are not bought with the liking of the trustees. The intention of naming trustees was to prevent unreasonable purchases, and the want of this circumstance, if the purchases are agreeable in other respects, is no reason to

In cases of constructive satisfaction, the thing given must be of the same kind and not less in value.

Consent of trustees not essential.

hinder why they should not be bought in performance of the articles. It is objected that the articles say the land shall be conveyed immediately. It is not necessary that every parcel should be conveyed as soon as bought, but after the whole was purchased, for it never could be intended that there should be several settlements under the same articles. Whoever is entitled to a performance of the covenant, the personal estate must be first applied, so far as it will go, and if the covenant is performed in part, it must make good the deficiency. But where a man is under an obligation to lay out £30,000 in lands, and he lays out part as he can find purchases, which are attended with all material circumstances, it is more natural to suppose those purchases made with regard to the covenant than without it. When a man lies under an obligation to do a thing, it is more natural to ascribe it to the obligation he lies under than to a voluntary act independent of the obligation. Then, as to all the cases of satisfaction, though these purchases are not strictly a satisfaction, yet they may be taken as a step towards performance; and that seems to me rather his intention than to enlarge his real estate. The case of *Wilcocks* v. *Wilcocks*,[1] though there are some circumstances that are not here, yet it has a good deal of weight with me. There the covenant was not performed, for the estate was to be settled, but the land was left to descend, and a bill was brought to have the articles made good out of the personal estate; to which it was answered, that the £200 per annum was bought which descended to you. It is true, a settlement hath not been made, but they were bought with an intention to make a settlement, and you can make one. The same will hold as strong in the present case, that these lands were bought to answer the purposes of the articles, and fall within that compass; and it is not an objection to say they are of unequal value, for a covenant may be executed in

Performance differs from satisfaction in that covenant may be executed in part.

[1] 2 Vern. 558.

part though it is not so in satisfaction; and in this particular I differ from the Master of the Rolls. There must be an account of what lands in fee simple in possession were purchased after the articles entered into, and so much as the purchase money of such lands amounts to must be looked on in part satisfaction of the £30,000 to be laid out in land under the articles, and the residue of the £30,000 must be made good out of the personal estate."

From the exhaustive judgment above quoted, besides the principal point for which the case was cited, we may consider four other points in connection with this subject as well established.

1. Where the lands purchased are of less value than the lands covenanted to be purchased and settled, they will be considered as purchased in part performance of the covenant. Rules.

2. Where the covenant points to a *future* purchase of lands, it cannot be presumed that lands of which the covenantor was seised at the time of the convenant, descending to his heir, were intended to be taken in part performance of it.

3. It cannot be presumed that property of a different nature from that covenanted to be purchased by the covenantor, was intended as a performance.[1]

4. That although by the settlement the consent of the trustee is required, still the absence of that consent will not necessarily prevent the presumption of performance from arising, if the other circumstances of the purchase are favourable to such presumption.

In the case of *Sowden* v. *Sowden*,[2] the doctrine of

[1] *Pinnell* v. *Hallett*, Amb. 106. [2] 1 Bro. C. C. 582.

Lechmere v. *Earl of Carlisle* was extended to a case where the covenant was to pay money to trustees, to be laid out by them in a purchase of land, and the covenantor himself purchased land, and took a conveyance to himself of the fee, and died intestate without having made a settlement.

Covenant to purchase does not create a lien on lands purchased.

It is clear that a covenant to purchase lands is a mere specialty debt, and will not create a specific lien on lands afterwards purchased, although the presumption may arise that they were purchased by the covenantor, intending them to go in performance of the covenant in his marriage articles; and, consequently, it will not affect a purchaser or mortgagor, with notice. And other specialty creditors cannot complain that the presumption arises that lands were purchased in performance of a covenant; for it is in the power of the owner of an estate to prefer one specialty creditor to another, for none of them have any specific lien on it.[1]

Right of *cestui que trust* to follow trust-fund.

Before leaving this part of the subject it may be well to refer briefly to a class of cases, occasionally referred to the head of performance, but coming under another principle, and depending upon the rule that the *cestui que trust* of a fund is entitled to follow that fund into any subject-matter into which it may have been wrongfully converted.[2] In the case of *Trench* v. *Harrison*[3] the trustees of a marriage settlement being empowered by it to invest the trust-funds in freeholds or copyholds of inheritance, with the consent of the husband and wife, authorised the husband to purchase a certain estate, as an investment of part of the trust-funds; and afterwards they sold out a sufficient part of those funds to pay for the estate, and the husband received the

[1] *Deacon* v. *Smith*, 3 Atk. 323; *Mornington* v. *Keane*, 2 De G. & J. 292.

[2] *Taylor* v. *Plumer*, 3 Maul. & Selw. 562.

[3] 17 Sim. 111.

proceeds. The estate was copyhold for lives, and the purchase was made without the wife's consent. It was held, nevertheless, that as between the husband and the trustees, he must be considered to have purchased the estate for them. These cases of following trust money into land have some resemblance to the case of performance, properly so called; but in essentials they differ materially. In the case of performance the husband is under an obligation to purchase the land, while in the cases of following trust money the husband is under no such obligation, and therefore all turns on the circumstance that the purchase was in fact made with trust money, with regard to which it is a well settled rule that the money may, in most cases, be followed into the land in which it is invested.[1]

Covenant to pay or leave by will, and share under the Statute of Distributions.

II. The second class of cases ranked under the head of performance is, where a husband covenants to pay his wife a gross sum of money, or part of his personalty, and he dies intestate, so that she becomes entitled to a portion of his personal property under the Statute of Distributions. The question sometimes arises whether such distributive share will be a performance of the covenant, or whether she can claim both the distributive share and the money due under the covenant. The solution of this question depends on the two following rules, which the cases on the point suggest:—

When husband's death occurs at or before time when the obligation accrues, distributive share a performance.

1. When the death of the husband occurs at the time, or previous to the time, when the obligation ought, by the terms of the settlement, to be performed, her distributive share will be taken as a performance of the covenant, *pro tanto* or *in toto*, as that share is on the one hand, less than, or, on the other hand, equal to, or greater than the sum due under the covenant.

[1] *Lench* v. *Lench*, 10 Ves. 511.

Thus, in *Blandy* v. *Widmore*,[1] A. covenanted, previous to his marriage, to leave his intended wife £620. The marriage took place, and the husband died intestate. The wife became entitled to a moiety amounting to more than £620 of her husband's personal property, under the Statute of Distributions. The Lord Chancellor held that this was a performance of the covenant, on the following ground—that the covenant was to be taken as not broken, for the husband had *left* his widow £620 and upwards; that, therefore, she could not come in first as a debtor for the £620 under the covenant, and then for a moiety of the surplus under the statute. This decision has sometimes been explained as having been decided on the ground that the covenantor, by not making a will, but letting the property devolve on the wife by course of law, showed an intention to satisfy the covenant. But it will be seen that this is not a correct view; for in the case of *Goldsmith* v. *Goldsmith*,[2] it was decided on the authority of *Blandy* v. *Widmore*, that where the trusts of a testator's *will* failed, and his property became divisible, as in case of intestacy, under the statute the widow's distributive share was a performance of the covenant by the husband under the marriage articles, that his executors, after his death, should pay her a certain sum of money. In his judgment, Sir T. Plumer, M.R., makes the following observations:—"Lord Eldon, in *Garthshore* v. *Chalie*,[3] speaking of *Blandy* v. *Widmore*, and other cases, says, 'These cases are distinct authorities that where a husband covenants to leave or to pay at his death a sum of money to a person who, independent of that agreement, by the relation between them and the provision of the law attending upon it, will take a provision, the covenant is to be construed with reference to that.' Considering the contract as made with that reference it

The covenant to be construed with reference to the married relation.

[1] 2 L. C. 378.
[2] 1 Swanst. 211.
[3] 10 Ves. 1.

must be interpreted as intended to regulate what the widow is to receive, and consequently when the event of intestacy ensues, the single question is, Does she not obtain that for which she contracted? If the object of the covenant is that the executors of the husband shall pay to the widow a given sum, and in her character of widow, created by the same marriage contract, she in fact obtains from the executor or administrator that sum, the court is bound to consider that as payment under the covenant. These are not cases of an ordinary debt; *during the life of the husband there is no breach of the covenant, no debt;* the covenant is to pay *after* his death, and the inquiry is not whether the payment of the distributive share is satisfaction, but a question perfectly distinct, whether it is performance."

During the husband's life there is no breach of covenant, no debt.

2. Where the decease of the husband occurs after the obligation of the covenant has already arisen, or in other words, after a breach of such covenant, the widow's distributive share is not a performance of the obligation.

Where husband's death occurs after obligation accrues distributive share not a performance.

Thus in *Oliver* v. *Brickland*,[1] the husband covenanted to pay a sum within two years after marriage, and if he died his executors should pay it. He lived after the two years and died intestate, leaving a larger sum than what he covenanted to pay, to devolve upon his widow as her distributive share. The Master of the Rolls held that she was entitled both to the money under the covenant and to her distributive share of the residue. Here it will be seen that there was a breach of covenant *before* his death, and that from the moment of such breach a *debt* accrued due to her; whereas in the first class of cases the obligation to pay arose at the *same time* at which the distributive share was allowed to devolve.

[1] Cited 1 Ves. 12; 3 Atk. 420.

There may be performance *pro tanto.*

Finally, it must be observed, that whereas in satisfaction the presumption will not hold where the thing substituted is less beneficial either in amount, or certainty, or time of enjoyment, or otherwise, than the thing contracted for; in performance the thing done, even though less beneficial in amonnt, certainty, &c., than the thing contracted to be done will, other circumstances concurring, be taken as performance *pro tanto* of the covenant.[1]

[1] Cox's note to *Blandy* v. *Widmore;* 1 P. Wms. 323.

CHAPTER XIII.

SATISFACTION.

Satisfaction supposes intention.

"An important distinction exists between satisfaction and performance. Satisfaction supposes intention; it is something different from the subject of the covenant, and substituted for it; and the question always arises, Was the thing done *intended* as a substitute for the thing covenanted to be done; a question entirely of intent. But with reference to performance the question is, Has the identical act which the party contracted to do been done?"[1]

The cases on the doctrine of satisfaction may be divided into *four* classes.

I. The satisfaction of debts by legacies.
II. Satisfaction of legacies by subsequent legacies.
III. The satisfaction of legacies by portions.
IV. The satisfaction of portions by legacies.

1. Of debts by legacies.

I. Satisfaction of debts by legacies.

The general rule is, "that if one, being indebted to another in a sum of money, does by his will give him a sum of money as great as, or greater than, the debt, without taking any notice at all of the debt, this shall nevertheless be in satisfaction of the debt, so that he shall not have both the debt and the legacy."[2] And this presumption is founded upon the maxim, *Debitor non presumitur donare.* These cases of satisfaction, founded on reasoning alike artificial and unsatisfactory,

Presumption not favoured.

[1] *Goldsmith* v. *Goldsmith*, 1 Swanst. 211.

[2] *Talbot* v. *Shrewsbury*; Prec. Ch. 394; 2 L. C. 345.

have met with the censure of the most eminent judges and the court, leaning against the presumption of satisfaction, have always endeavoured to lay hold of trifling circumstances in order to prevent its application.

Rules. From the various cases on the subject may be collected the following rules:—

1. Legacy imports bounty. 1. Words ordinarily employed to grant a legacy, show an intention of favour rather than an intention to fulfil an obligation, *i.e.*, "a legacy imports bounty."

2. If legacy be equal to debt. 2. If the debtor bequeaths exactly the same sum, *simpliciter*, as the debt, it will be taken as satisfaction *Debitor non presumitur donare.*[1]

3. If legacy be less than debt. 3. If the legacy be less than the debt, it was never held to go in satisfaction, not even *pro tanto.*[2]

4. Legacy greater than debt. 4. The legacy of a sum, *simpliciter*, greater than a debt will be taken as satisfaction of the debt, and only imports bounty as to the excess of the legacy over the debt.[3]

5. Debt contracted after will. 5. The presumption will not be raised where the debt of the testator was contracted subsequently to the making of the will; for he could have no intention of making any satisfaction for what was not in existence.[4]

6. Circumstances rebutting the presumption. 6. Equity will lay hold of slight circumstances to indicate an intention that the legacy shall not go as a satisfaction. A few cases will illustrate how strong the leaning in equity is against the presumption of satisfaction.

[1] *Haynes* v. *Mico*, 1 Bro. C. C. 130.
[2] *Eastwood* v. *Venke*, 2 P. Wms. 617.
[3] *Talbot* v. *Shrewsbury*, 2 L. C. 345.
[4] *Cranmer's Case*, 2 Salk. 508.

Direction in will for payment of debts and legacies.

Where there is an express direction in the will for payment of *debts and legacies*, the court will, it seems, infer that it was the intention of the testator that both the debt and the legacy should be paid to his creditor. Thus, in *Chancey's case*,[1] A. being indebted for wages to a maid-servant who had lived with him a considerable time, gave her a bond for £100, and in the consideration of the bond, it appeared to be for *wages*. Afterwards, by his will, he gave her a legacy of £500, stating in his will that it was "*for her long and faithful service;*" and he directed *that all his debts and legacies should be paid*. It was held that the legacy was not a satisfaction of the debt due on the bond, and the maid-servant had both her debt and legacy. The court said that this case was attended with peculiar circumstances varying it from the common case, viz., that the testator, by the express words of his will, had devised "that all his debts and legacies should be paid;" and this £100 being then a *debt*, and the £500 being a *legacy*, it was as strong as if he had directed that both the bond and the legacy should be paid.

Direction to pay debts alone.

But it is doubtful whether a direction to pay debts *alone* will be sufficient to rebut the presumption of satisfaction. In *Edmunds* v. *Low*,[2] Wood, V.-C., held that a charge of debts standing alone was not sufficient; though the weight of authority seems to be in favour of the proposition, that if not absolutely sufficient of itself to rebut the presumption, it is at least a strong circumstance against such a presumption.[3]

Time for payment of legacy differing from that of debt.

Another ground for avoiding the presumption of the satisfaction of a debt by a legacy, arises where the time fixed for the payment of the legacy is different from the time when the debt is due. Thus, in *Clarke* v. *Sewell*,[4]

[1] 1 P. Wms. 408; 2 L. C. 346.
[2] 3 K. & J. 318, 321.
[3] *Rowe* v. *Rowe*, 2 De G. & Sm. 297, 298; *Russel* v. *Hankins*, 7 W. R. 314; *Pinchin* v. *Simms*, 30 Beav. 119; *Glover* v. *Hartcup*, 34 Beav. 74.
[4] 3 Atk. 96.

the testator gave a legacy of £1000 to his mother, to be paid by the trustees, *one month* after his decease. The mother was entitled to £2000 from the estate of her son, in consequence of his having succeeded to the stock-in-trade of his father. It was held that there was no satisfaction—that in order to be so deemed, it ought to have become payable immediately on the testator's death, at which time the debt due from the son to the mother became payable; whereas, the legacy was to be paid *one month after* the testator's death.[1] In *Wathen* v. *Smith*,[2] where the legacy was payable at an earlier date than the money due on the settlement, and was therefore to the advantage of the legatee and creditor, it was held that the presumption of satisfaction arose; but see *Cole* v. *Willard*.[3]

Contingent legacy.

Where the legacy is contingent or uncertain, it will not be held a satisfaction of a debt. Thus, in *Barret* v. *Beckford*,[4] a testator being under an obligation to pay an annuity to A., by his will gave the *residue* of his property to his mother and A. for life. It was held that this legacy of a moiety of the residue to A. was not a satisfaction of the annuity to A.; that in order that the gift should be deemed a satisfaction, it was necessary that the subject-matter of the gift, and the debt should be exactly of the same nature, and of equal certainty. From the case of *Devese* v. *Pontet*,[5] it will be seen that a gift, by will, of a residue to a wife, will not be a satisfaction of a debt due to her, and that the rule of *Blandy* v. *Widmore* in cases of intestacy is inapplicable to cases where there is an operative will.[6]

2. Satisfaction of legacies by subsequent legacies.

II. Satisfaction of legacies by subsequent legacies. Two classes of cases will occur under this head.

[1] *Haynes* v. *Mico*, 1 Bro. Ch. Ca. 129.
[2] 4 Mad. 325.
[3] 25 Beav. 568.
[4] 1 Ves. Sr. 519.
[5] 1 Cox 188.
[6] *Bartlett* v. *Gillard*, 3 Russ. 149.

(*a.*) Where the legacies are by the same instrument.

(*b.*) Where the legacies are by different instruments.

Two legacies under the same instrument. Equal.

(*a.*) Where legacies of quantity in the *same* instrument, whether a will or codicil, are given to the same persons *simpliciter*, and are of *equal* amount, one only will be good, nor will small differences in the way in which the gifts are conferred afford internal evidence that the testator intended they should be cumulative. Thus, in *Greenwood* v. *Greenwood*,[1] the testatrix gave "to her niece, Mary Cook, the wife of John Cook, £500," and afterwards, in the same will, amongst many other legacies, "to her cousin, Mary Cook, £500 for her own use and disposal, notwithstanding her coverture." It was held that Mary Cook was entitled to one legacy only, of £500, and that the same was for her separate use.

Unequal.

Where, however, the legacies given by the *same* instrument are of *unequal* amount, they will be considered cumulative.[2]

By different instruments *primâ facie* cumulative.

Unless same motive expressed and same sum.

(*b.*) Where a testator by *different* testamentary instruments has given legacies of quantity *simpliciter* to the same person, the court considering that he who has given more than once, must, *primâ facie*, mean more than one gift, awards to the legatee all the legacies, and it is immaterial whether the subsequent legacy differs in any particulars from the prior one.[3] But though the legacies are in different instruments, if they are not given *simpliciter*, but the motive of the gift is expressed, and in such instruments the *same*

[1] 1 Bro. C. C. 31 *n.*

[2] *Hooley* v. *Hatton*, 1 Bro. C. C. 390 *n.*; *Curry* v. *Pile*, 2 Bro. C. C. 225; *Yockney* v. *Hansard*, 3 Hare, 620.

[3] *Roch* v. *Callen*, 6 Hare, 531; *Russell* v. *Dickson*, 4 Ho. of Lds. 293.

motives are expressed, and the *same sum* is given, the court considers these two coincidences as raising a presumption that the testator did not, by a subsequent instrument mean another gift, but only a repetition of the former gift.[1] But the court raises this presumption *only*, where the double coincidence occurs, of the *same motive* and the *same sum* in both instruments. But if in either instrument there be, on the one hand, *no motive*, or a *different* or *additional* motive expressed, and the *sum* be the *same* in both instruments,[2] or, on the other hand, though the *same motive* be expressed in different instruments, but the *sums* are different,[3] the presumption will be in favour of accumulation rather than substitution.

Where, however, a second instrument expressly refers to the first, or where, by intrinsic evidence, the later instrument was a mere revision, explanation, or copy of the former, it will so far be held substitutional.[4] As to the question, when extrinsic evidence is receivable in favour of or against the presumption, the authorities seem to lead to the following conclusions.[5]

Extrinsic evidence.

Where the court raises the presumption.

(*a.*) That where the court itself raises the presumption against double legacies—where, for instance, two legacies of equal amount are given by one instrument, parol evidence is admissible to show that the testator intended the legatee to take both, for that is in support of the apparent intention of the will.

Where the court does not raise the presumption.

(*b.*) But where the court does not raise the presumption—where, for instance, legacies of equal amount are

[1] *Benyon* v. *Benyon*, 17 Ves. 34.
[2] *Roch* v. *Callen*, 6 Hare 531; *Ridges* v. *Morrison*, 1 Bro. C. C. 388.
[3] *Hurst* v. *Beach*, 5 Mad. 352; *Baby* v. *Miller*, 1 E. & A. 218.
[4] *Fraser* v. *Byng*, 1 Russ. & My. 90; *Coote* v. *Boyd*, 2 Bro. C. C. 521; *Currie* v. *Pye*, 17 Ves. 462.
[5] 2 L. C. 329.

given *simpliciter* by different instruments—parol evidence is not admissible to show that the testator intended the legatee to take one only, for that is in opposition to the will.[1]

III. The satisfaction or, as it is more correctly termed, the ademption[2] of a legacy by a portion.

IV. The satisfaction of a portion by a legacy.

Ademption of legacy by portion, and *vice versâ*.

"Where a parent gives a legacy to a child, not stating the purpose with reference to which he gives it, the court understands him as giving a portion," and by a sort of artificial rule—in the application of which legitimate children have been very harshly treated—upon an artificial notion, and a sort of feeling upon what is called leaning against double portions—if the father advances a portion on the marriage of that child the latter is presumed to be an ademption of the legacy *pro tanto*, or *in toto* as the money advanced is respectively less than, or equal to, or greater than the sum given by the legacy.[3]

The following observations apply generally as well to the ademption of a legacy by a portion, as of a portion by a legacy:—

Rule does not apply as to legacies and portions to a stranger.

1. In the case of double provisions, the doctrine of satisfaction does not in general apply to legacies and portions to strangers, but only where the parental

[1] *Hurst* v. *Beach*, 5 Mad. 351; *Hall* v. *Hill*, 1 Dr. & War. 94; *Lee* v. *Pain*, 4 Hare 216.

[2] "When the will is made first, and the settlement afterwards, it is always treated as a case of what is called ademption—that is to say, the benefits given by the settlement are considered to be an ademption of the same benefits given to the same child by the will.

"With reference to cases . . . . of a previous settlement and a subsequent will . . . . it is now quite settled that there is no difference between the two cases, beyond the verbal difference that the term satisfaction is used where the settlement has preceded the will, and the term ademption where the will has preceded the settlement. In substance there is no distinction between the principles applied to the two classes of cases."—*Coventry* v. *Chichester*, 2 H. & M. 159.

[3] *Pym* v. *Lockyer*, 5 My. & Cr. 29.

relation, or its equivalent, exists. If, therefore, a person give a legacy to a mere stranger, and then make a settlement on that stranger; or first agree to make a settlement on that stranger, and then bequeath a legacy to him: the stranger is entitled to claim under both instruments; and for the purpose of this doctrine it is settled that an illegitimate child is in the eye of the law a stranger; and that, unless other circumstances are found than the bare relation of parentage "by nature," the illegitimate child is at liberty to claim a double provision.[1]

Or illegitimate child.

Unless the legacy and portion be for the same specific purpose.

But the rule will apply, though the testator stands neither in the legal nor assumed relation of a parent to the legatee, if the legacy be given for a particular purpose, and the testator advances money for the same purpose.[2]

Presumption founded on good sense.

The presumption against double portions has been characterised as a hard and artificial rule, but, on examination, will appear to be founded on good sense and justice. In *Suisse* v. *Lowther*,[3] Wigram, V.-C., makes the following remarks:—"The rule of presumption, as I before said, is against double portions as between parent and child; and the reason is this—a parent makes a certain provision for his children by will, if they attain 21, or marry, or require to be settled in life; he afterwards makes an advancement to a particular child. Looking at the ordinary dealings of mankind, the court concludes that the parent does not, when he makes that advancement, intend the will to remain in full force, and that he has satisfied in his lifetime the obligation which he would otherwise have discharged at his death; and having come to that conclusion, as the result of general experience, the court

[1] *Ex parte Pye*, 18 Ves. 140.
[2] *Monck* v. *Monck*, 1 Ball. & B. 303; *Pankhurst* v. *Howell*, L. R. 6 Ch. 136.
[3] 2 Hare, 435.

acts upon it, and gives effect to the presumption that a double provision was not intended. If, on the other hand, there is no such relation either natural or artificial, the gift proceeds from the mere bounty of the testator; and there is no reason within the knowledge of the court for cutting off anything which has in terms been given. The testator may give a certain sum by one instrument, and precisely the same sum by another; there is no reason why the court should assign any limit to that bounty which is wholly arbitrary. The court, as between strangers, treats several gifts as *primâ facie* cumulative. The consequence is, as Lord Eldon observed, that a natural child, who is in law a stranger to the father, stands in a better situation than a legitimate child, for the advancement in the case of the natural child is not, *primâ facie*, an ademption.

Applies where donor has placed himself *in loco parentis* to donee.

2. The next general proposition is, that although the doctrine of satisfaction does not, as a general rule, apply where the donee is a stranger, it may, and does apply where the donor has placed himself "*in loco parentis*" towards the beneficiary.

What is putting one's-self *in loco parentis*.

As to what constitutes the *quasi* parental relation, which is signified by the words, "putting one's-self *in loco parentis*," the case of *Powys* v. *Mansfield*[1] is in point. There the question arose whether Sir John Barrington, who had by his will given £10,000 to one of his nieces, and had afterwards settled £10,000 on her marriage, stood "*in loco parentis*" to the niece, so as to give rise to the application of the doctrine of satisfaction. The niece was one of the daughters of Sir John's brother, Fitzwilliam, and the general relations subsisting between the uncle and nieces were thus stated in the evidence, "That Sir Fitzwilliam, in compliance with the wishes of Sir John, resided near

[1] 6 Sim. 544, 3 My. & Cr. 359.

Sir John, in the Isle of Wight, and maintained a more expensive establishment than his income (which did not exceed £400 a year) would allow of; that Sir John and his brother lived on the most affectionate terms with each other; that for several years Sir John gave his brother £1000 a year; that he took the greatest interest in his nieces, behaved to them as a father, and always acted to them as the kindest of parents, not showing more partiality to one than to another; that he frequently gave them pocket money, and made them other presents, and occasionally advanced money to defray the expense of their clothing and education; that he allowed them to use his horses and carriages, and had them frequently to dine with him, and that one or other of them was almost always staying at his house; that he was consulted as to the appointment of their masters and governesses, and as to the marriages of such of them as were married; and that on the plaintiff's marriage, the terms of the settlement were negotiated between the plaintiff and Sir John, and their respective solicitors, without any interference on the part of Sir Fitzwilliam; that Sir John, who gave the instructions for the settlement on the 20th April 1817, proposed that the £10,000 should be settled on *all* the children of the marriage, but afterwards, on the suggestion of the plaintiff, it was agreed that the £10,000 should be settled on the younger children only, as the eldest son would be entitled to a considerable estate on his father's side." Upon these facts, the Lord Chancellor, reversing the decision of the Vice-Chancellor, held that Sir John had placed himself "*in loco parentis*," making the following observations:—"The authorities leave in some obscurity the question as to what is to be considered as meant by the expression universally adopted of one '*in loco parentis*.' Lord Eldon, however, in *Ex parte Pye*, has given to it a definition which I readily adopt, not only because it proceeds from his high authority, but because it seems to me to embrace all

that is necessary to work out and carry into effect the object and meaning of the rule. Lord Eldon says, it is a person *meaning* to put himself *in loco parentis*, in the situation of the person described as the lawful father of the child; but this definition must, I conceive, be considered as applicable to those parental offices and duties to which the subject in question has reference—namely, to the office and duty of the parent to make provision for the child. The offices and duties of a parent are infinitely various, some having no connection whatever with making a provision for the child, and it would be most illogical from the mere exercise of any such offices or duties, by one not the father, to infer any intention in such person to assume also the duty of providing for the child. The relative situation of the friend and of the father may make this unnecessary, and the other benefits most essential.

A person, meaning to put himself *in loco parentis* with reference to providing for the child.

"Sir William Grant's definition is—'A person assuming the parental character, or discharging parental duties,' which may seem not to differ much from Lord Eldon's; but it wants that which, to my mind, constitutes the principal value of Lord Eldon's definition—namely, the referring to the intention, rather than to the act, of the party. The Vice-Chancellor says it must be a person who has so acted towards the child as that he has thereby imposed on himself a moral obligation to provide for it, and that the designation will not hold where the child has a father with whom it resides, and by whom it is maintained. This seems to infer that the *locus parentis* assumed by the stranger must have reference to the pecuniary wants of the child, and that Lord Eldon's definition is to be so understood, and I so far agree with it; but I think the other circumstances required are not necessary to work out the principle of the rule, or to effectuate its object. The rule, both as applied to a father and to one *in loco parentis*, is founded upon the presumed intention. A

Must refer to intention of donor.

father is supposed to intend to do what he is in duty bound to do—namely, to provide for his child according to his means. So, one who has assumed that part of the office of a father is supposed to intend to do what he has assumed to himself the office of doing. If the assumption of the character be established, the same inference and presumption must follow. The having so acted towards a child as to raise a moral obligation to provide for it, affords a strong inference in favour of the fact of the assumption of the character; and the child having a father with whom it resides, and by whom it is maintained, affords some inference against it; but neither are conclusive."

Leaning against double portions.

Whereas in the case of satisfaction of a debt by a legacy, equity leans strongly against the presumption, the leaning is all the other way in the case of portions. In this case the presumption of satisfaction will not be repelled, "though there may be slight circumstances of difference between the advance and the portion." Thus, in the case of *Lord Durham* v. *Wharton*,[1] a father by will bequeathed £10,000 to trustees, one half to be paid at the end of three years, and the other half at the end of six years from his death, with interest in the meanwhile, and declared the trusts to be for his daughter for life, and after her decease in trust for her children, as she should appoint by deed or will, and in default of appointment for all her children equally; and subsequently, on the marriage of the daughter, agreed to give her £15,000, to be paid to the intended husband, he securing by his settlement pin money and a jointure for his wife, and portions for the younger children of the marriage. It was held that the £10,000 was satisfied by the sum advanced by the father. It is to be observed how strong this decision was. By the will, the daughter took a life interest; by the settlement, a jointure. By the

[1] 3 Cl. & F. 146.

will, *all* the children of the daughter took; by the settlement, portions were provided only for the younger children of the particular marriage.

Same principles applicable when settlement comes before will.

And the above principles will be applied not only where, as in the above case, the will precedes the settlement, but where the order of events is, first, a settlement; secondly, a will. This was decided in the case of *Thynne* v. *Glengall*.[1] There a father having, upon the marriage of his daughter, agreed to give her a portion of £100,000 consols, transferred one-third thereof to the *four trustees* of the marriage settlement, and gave them his bond for transfer of the remainder in like stock upon his death; the latter stock to be held by them in trust for the daughter's separate use for life, and after her death for the children *of the marriage*, as the *husband and she* should jointly appoint. The father afterwards by his will gave to *two* of the trustees a moiety of the *residue* of his personal estate in trust for the daughter's separate use for life, remainder for *her* children generally as *she* should by deed or will appoint. And it was held that the moiety of the residue given by the will was a satisfaction of the sum of stock secured by the bond, notwithstanding the differences of the trusts; and it being found to be for the benefit of the daughter and children, if she should have any, to take under the will, she was held bound to elect so to take. With reference to this subject, the following remarks were made in the House of Lords:—"We must throw out of consideration all the cases in which questions have arisen as to legacies being or not being held to be in satisfaction of debt; for, however similar the two cases may appear at first sight, the rules of equity, as applicable to each, are absolutely opposed, the one to the other. Equity leans against legacies being taken in satisfaction of debt, but leans in favour of a provi-

Not a question of satisfaction of a debt.

[1] 2 Ho. of Lds. 131.

sion made by will being in satisfaction of a portion by contract, feeling the great improbability of a parent intending a double portion for one child, to the prejudice generally, as in the present case, of other children. In the case of debt, therefore, small circumstances of difference between the debt and legacy are held to negative any presumption of satisfaction; whereas, in the cases of portions, small circumstances are disregarded. So in the case of debt, a smaller legacy is not held to be in satisfaction of part of a larger debt; but in the case of portions, it may be a satisfaction *pro tanto*. In the case of a debt, a gift of the whole or part of the residue cannot be a satisfaction, because it is said, the amount being uncertain, it may prove to be less than the debt. In considering whether this rule applies to portions, which is the only question in this case, the reason of the rule as applicable to debts must not be lost sight of, because as a portion may be satisfied *pro tanto* by a smaller legacy, the reason given for the rule as applicable to debts cannot apply to portions. And, on the contrary, as the residue must be supposed by the testator to have been of some value, it would appear on principle that it ought to be considered as satisfaction altogether, or *pro tanto* according to the amount. For why should £1000, given as a residue, not have the same effect upon a larger portion as £1000 given as a money legacy."

Where settlement comes first, persons taking under it are purchasers

It will be seen that there is no objection in principle to the application of this doctrine where the will precedes the settlement, and the trusts are dissimilar; yet in the case where the settlement comes first, a difficulty necessarily arises. For, in this latter case, the class entitled under the settlement are *purchasers*, and as such cannot be deprived against their will of their rights upon any presumed intention of the testator. At the utmost they can only be put to

election whether to take under the will or under the settlement, and the presumption against double portions will be much more easily rebutted, than where the will precedes the settlement. The distinction is thus stated by Lord Cranworth, in his judgment in *Chichester* v. *Coventry*,[1]—"When the will precedes the settlement, it is only necessary to read the settlement as if the person making the provision had said, 'I mean this to be in lieu of what I have given by my will.' But if the settlement precedes the will, the testator must be understood as saying, 'I give this in lieu of what I am already bound to give, if those to whom I am so bound will accept it.' It requires much less to rebut the latter than the former presumption."

Legacy to a child to whom father is indebted.

Where a parent gives a legacy to a child to whom he is already *indebted*, the case stands on the same footing as a legacy by any other person in satisfaction of a *debt*, not being a portion; hence a subsequent legacy will not, in the absence of intention, express or implied, be considered as a satisfaction of the debt, unless it be either equal to or greater than the debt in amount, and unless the presumption of satisfaction be not repelled by any of those slight circumstances which will take a bequest of such amount to a stranger out of the general rule.[2] And the same rules apply to a legacy to a wife to whom the husband is indebted.[3]

Or to a wife.

Advancement by father to child to whom he is indebted.

Where a parent, however, being indebted to his child makes, in his lifetime, an advancement to the child upon marriage or upon some other occasion of a portion equal to or exceeding the debt, it will *primâ facie* be considered a satisfaction; and it is immaterial

[1] L. R. 2 H. L. 87.
[2] *Stocken* v. *Stocken*, 4 Sim. 152.
[3] *Fowler* v. *Fowler*, 3 P. Wms. 353; *Cole* v. *Willard*, 25 Beav. 568.

whether the portion be given in consideration of natural love or affection, or whether in the case of a portion to a daughter, the husband be ignorant of the debt. Thus, in *Wood* v. *Briant*[1] a father administrator *durante minore ætate* of his daughter, who was executrix and residuary legatee of her grandmother's estate, agreed when she married with the plaintiff that she should have £800, which in the settlement was called her portion. Lord Hardwicke refused to decree an account of the grandmother's personal estate, as she had been dead twenty years; but directed that the father's representatives should account for his personal estate as to the £800 only, and interest at four per cent. from the marriage.[2] Lord Hardwicke said, "There are very few cases where a father will not be presumed to have paid the debt he owes to his daughter, when, in his lifetime he gives her in marriage a greater sum than he owed her, for it is very unnatural to suppose that he would choose to leave himself a debtor to her, and subject to an account."

Sum given by second instrument, if less, satisfaction *pro tanto*.

It was for some time an unsettled point as to whether, if the sum given by a second instrument was smaller than that given by the first, the less sum operated as a total satisfaction of the larger. This question can of course be of practical value only where the will precedes the settlement; for where the order is reversed, and the settlement comes first, the rights of those taking under a positive contract such as a settlement is, cannot be affected or modified by subsequent voluntary gifts. It was for a long time considered that the settlement of a smaller portion effected a complete ademption of a larger legacy given by a previous will. But it was left to Lord Cottenham in

[1] 2 Atk. 521.
[2] *Hayes* v. *Garvey*, 2 J. & L. temp. Sugd. 268; *Plunket* v. *Lewis*, 3 Hare 316.

the case of *Pym* v. *Lockyer*,[1] to establish the true and logical rule that an advancement subsequent to a will, if less in amount than the sum given by the will, was to be considered a satisfaction *pro tanto* only.

Extrinsic evidence.

As to "extrinsic evidence." The rule against double portions is a presumption of law, and like other presumptions of law may be rebutted by evidence of extrinsic circumstances, *i.e.*, evidence of facts not contained in the written instrument itself. The rules on this subject will be best illustrated by the cases of *Hall* v. *Hill*,[2] and *Kirk* v. *Eddowes*.[3] In *Hall* v. *Hill* the facts were as follows: the testator, on the marriage of his daughter, intended to provide a sum of £800 as her portion, and the matter was arranged thus. The intended husband gave a bond of the same amount to the trustees of the marriage settlement, and this was settled upon the intended wife and issue; and the father at the same time gave a counter-bond for the like sum to the husband, payable by instalments, part thereof to be paid during his life, and the residue upon his decease; and afterwards by his will bequeathed to his said daughter a legacy of £800. Parol evidence was tendered on the part of the defendants to show what was the real intention of the testator. By that evidence it was proved beyond a doubt that the intention of the testator at the time of making his will was to satisfy, by means of the legacy, the portion he had provided for his daughter. Two questions arose; 1st, whether the legacy to the daughter was to be considered as a satisfaction of the bond executed to the husband; and 2nd, whether parol evidence was admissible to show that such was the intention of the testator. With regard to the first question, it is sufficient to state that the Lord Chancellor held that by construction of law the legacy could not be considered as a satisfaction of

[1] 5 My. & Cr. 29.
[2] 1 Dr. & War. 94.
[3] 3 Hare, 509.

the debt to the husband. This being so decided, necessarily raised the question, whether evidence of the testator's intention that the legacy should be a satisfaction was admissible. "There is no doubt of the general rule that when by presumption you come to a construction against the apparent intention of the instrument, that may be rebutted by parol evidence." After a thorough investigation of all the cases, the Lord Chancellor thus concludes: "Having now gone through the cases, the question is, what am I to do in the present case? Here the debt was first incurred, and then comes the will. I have already decided that the legacy to the daughter by that will could not, by the general rules of the court, be held to be a satisfaction of the debt. How then can I admit parol evidence to lead me to a different conclusion from what I have arrived at by construction? The will gives a legacy simply. The law, as declared by me, says, that this legacy is not in satisfaction of the previous debt. If I then admit parol evidence it must be in connection with the will, it has nothing to do with the debt. The debt was contracted before the will was made, and the declarations of the testator which have been adduced in evidence cannot apply to the debt, but must be used in reference to the will only; and I am asked now to insert in the will a declaration by the testator which I do not find in it, namely, that he means the legacy to be a satisfaction of the debt. I am of opinion I can do no such thing. If I were to admit the evidence it would be, not with a view to extrinsic circumstances, but to the construction of the will itself. I must, therefore, reject the parol evidence which has been offered in this case, and declare that upon the true construction of the will the legacy is not to be taken in satisfaction of the debt." In *Kirk* v. *Eddowes*,[1] a father bequeathed £3000 for the separate use of his daughter for life, with ulterior trusts for her children.

A presumption against the apparent intention of instrument may be rebutted by parol evidence.

Admitted only to construe the will, not to import extrinsic circumstances.

[1] 3 Hare, 509.

Subsequently he gave the daughter and her husband a promissory-note for £500 then due to him. The defendants alleged the £500 to have been intended as a satisfaction *pro tanto* of the legacy of £3000, and tendered evidence of the declarations of the testator at the time of handing over the note, that it was to be in part satisfaction of the legacy of £3000, and that the testator was advised by his solicitor that it was not necessary to alter his will to give it that effect. Wigram, V.-C., held that this evidence was admissible on the following reasoning :—" Where similar questions have arisen upon gifts given by two distinct instruments, the law as to the admissibility of parol evidence has, I believe, been long since settled. In such cases the rule of law applies that written instruments cannot be added to, or explained by, parol evidence; and, therefore, unless the second instrument in express terms or by presumption of law adeems the gift made by the instrument of earlier date, no question can arise. Both instruments will take effect. Again, if the second instrument in terms adeems the gift by the first, it could not, I apprehend, be contended that it would not produce its intended effect; a party claiming under and having taken the benefit of it, could not claim that benefit and at the same time refuse to give full effect to it. If, however, the second instrument do not in terms adeem the first, but the case is of that class in which, from the relation between the author of the instrument and the party claiming under it (as in the actual or assumed relation of parent and child), or on other grounds, the law raises a presumption that the second instrument was an ademption of the gift by the instrument of earlier date, evidence may be gone into, to show that such presumption is not in accordance with the intention of the author of the gift; and where evidence is admissible for that purpose, counter-evidence is also admissible. In such cases the evidence

Presumption of law raised from relation of parties may be rebutted.

is not admitted on either side for the purpose of proving in the first instance with what intent either writing was made, but for the purpose only of ascertaining whether the presumption which the law has raised be well or ill founded . . . In this case the advance of £500 was after the date of the will. This, the second transaction, however, is not evidenced by any writing, and the technical rule, to which I have referred, against admitting evidence to prove what was the intention of the parties to that transaction, does not therefore apply. The question is, whether any other rule applies which shall exclude the evidence. . . . . The declarations of the testator accompanying the transaction were objected to. Why should these accompanying declarations not be admissible? They are of the essence of the transaction, and the truth of the transaction itself cannot be known to the court without them. The rule which would exclude the evidence, if the intention of the parties had been expressed in writing, does not apply. . . . . The evidence does not touch the will, it proves only that a given transaction took place after the will was made, and proves what that transaction was, and calls upon the court to decide whether the legacy given by the will is not thereby adeemed. Ademption of the legacy, and not revocation of the will, is the consequence for which the defendant contends. The defendant does not say the will is revoked, he says the legatee has received his legacy by anticipation.

"Upon the whole, not holding that extrinsic evidence can in any case be admitted to alter, add to, or vary a written instrument, or to prove with what intention an instrument was executed, nor that declarations of the testator made at any other time than contemporaneously with the advance, and as part of the transaction, the truth of which I am bound to ascertain, would, in this case, be admissible; and distinguishing between

revocation and ademption, I am of opinion that this evidence must be received."

Note.—On the subjects of conversion, election, satisfaction, and performance, the author has to acknowledge his obligations to Messrs White & Tudor's Leading Cases, and also to the valuable lectures of Mr Haynes on those subjects.

CHAPTER XIV.

ADMINISTRATION OF ASSETS.

WHERE a testator possessed of property of various kinds dies indebted, having disposed of his estate among different persons, or not having made any disposition, it often becomes material to consider the order and sometimes the proportions and mode in which the several classes of property are applicable to the liquidation of the debts; for every description of property is now constituted assets. That property of a deceased person which is available at common law for the purpose of satisfying his creditors, is commonly termed *legal assets*, and will be applied both at law and in equity, in the ordinary course of administration, which gives debts of a certain nature a priority over others; where, however, the assets are such as are available only in a court of equity, they are termed *equitable assets*, and according to the well-known maxim, that equality is equity, will, after satisfying those who have liens on any specific property, be distributed amongst the creditors of all grades, *pari passu*, without any regard to legal priority. But it should be observed that property is not distributable as equitable assets, merely because it is an object of equitable jurisdiction. The true principle is thus laid down by V.-C. Kindersley, in *Cook* v. *Gregson*,[1] "The general proposition is

Distinction between legal and equitable assets.

Equitable assets distributable *pari passu*.

[1] 3 Drew. 549.

clear enough, that when assets may be made available in a court of law, they are legal assets; and when they can only be made available through a court of equity, they are equitable assets. This proposition, however, does not refer to the question whether the assets can be recovered by the executor in a court of law, or in a court of equity. The distinction refers *to the remedies of the creditor*, and not to the nature of the property. The question is not, whether the testator's interest was legal or equitable, but whether a creditor of the testator, seeking to get paid out of such assets, can obtain payment thereout from a court of law, or can only obtain it through a court of equity. This I apprehend is the true distinction. If a creditor brings an action at law against the executor, and the executor pleads *plenè administravit*, the truth of the plea must be tried by ascertaining what assets the executor has received, and whatever assets the court of law, in trying that question, would charge the executor with, must be regarded as legal assets; all others would be equitable assets. Suppose, however, that distinction to be well founded, there still remains the question—What property come to the hands of the executor would a court of law consider property to be taken into account as assets, in trying the truth of the plea *plenè administravit?* I think the general principle is, that a court of law would treat as assets every item of property come to the hands of the executor, which he has recovered, or had a right to recover, merely *virtute officii*, *i.e.*, which he would have had a right to recover, if the testator had merely appointed him executor, without saying anything about his property or the application thereof."

Distinction refers to the creditor's remedies.

Legal assets are those recoverable by the executor *virtute officii.*

An act recently passed to abolish the priority of specialty over simple contract debts,[1] has rendered the distinction between legal and equitable assets of far

Course of administration of legal assets before 32 & 33 Vict., c. 46.

[1] Stat. 32 & 33 Vict., c. 46.

less importance than formerly. In cases, however, which do not fall within the act, the following is the legal order in which personal property, which comes into the hands of the executor or administrator by virtue of his office, is distributed among the creditors of the deceased:—

1. Debts due to the Crown by record or specialty.[1]
2. Debts to which particular statutes give priority.[2]
3. Judgment debts, duly registered.[3]
4. Recognisances and statutes.
5. Debts by specialty contracts, for valuable consideration, whether the heir be, or be not, bound.[4] Arrears of rent service, even though the rent be reserved by parol, rank equally with specialties.[5]
6. Debts by simple contract and unregistered judgments, which only rank *pari passu* with debts by simple contract.[6]
7. Voluntary bonds;[7] but if a voluntary bond be assigned for value, at any rate in the life of the obligor, it will, in the administration of assets, stand on the same footing as a bond originally given for value.[8]

Lands not charged with debts legal assets by 3 & 4 Will. IV., c. 104.

Lands not charged with the payment of debts are sometimes called legal assets. The stat. 3 & 4 Will. IV., c. 104, enacts that all the real estate of a deceased person, "which he shall not by his last will have charged with, or devised subject to the payment of his debts, shall be administered in courts of *equity*, for the payment of the just debts of such person, as well debts due on *simple contract*, as *on specialty*." But the order of payment out of such land is not *pari passu*, according to the mode in which equity administers

Order of payment out of lands not charged with debts.

[1] 2 Inst. 32.
[2] See 17 Geo. II., c. 38, s. 3; 58 Geo. III., c. 73, ss. 1 & 2; 18 & 19 Vict., c. 63, s. 23.
[3] Stats. 2 & 3 Vict., c. 11; 18 & 19 Vict., c. 15; 23 & 24 Vict., c. 38, ss. 3, 4, 5; 27 & 28 Vict., c. 112, s. 1.
[4] 9 Co. 88 *b*.
[5] Com. Dig. Admin. c. 2.
[6] *Re Turner*, 12 W. R. 337; 23 & 24 Vict., c. 38; *Kemp* v. *Waddingham*, L. R. 1 Q. B. 355.
[7] *Ramsden* v. *Jackson*, 1 Atk. 294.
[8] *Payne* v. *Mortimer*, 4 De G. & J. 447.

equitable assets. The statute lays down the following order of payment:—

1. Specialties in which the heirs are bound.
2. Specialties in which the heirs are not bound, and simple contract debts, to rank equally.

Debts paid *pari passu*, out of lands charged with or devised for their payment.

If, however, a testator *devises lands for, or charges them* with the payment of debts, they will be equitable assets, and as such distributable among his creditors *pari passu*.[1] Hence arises this curious result, that the debtor, after having entered into bonds binding his heir, may, at his own pleasure, place his creditors who hold bonds on the same footing with those who have none. He has only to charge his real estate with the payment of his debts.

By 32 & 33 Vict., c. 46, specialty and simple contract debts of persons dying after January 1, 1870, stand in equal degree.

But now, by 32 & 33 Vict., c. 46, it is enacted that, "in the administration of the estate of every person who shall die on or after the 1st day of January 1870, no debt or liability of such person shall be entitled to any priority or preference, by reason merely that the same is secured by or arisen under a bond, deed, or other instrument under seal, or is otherwise made or constituted a specialty debt; but all the creditors of such person, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets of such deceased person, whether such assets are legal or equitable, any statute or other law to the contrary notwithstanding: Provided, also, that this act shall not prejudice or affect any lien or charge, or other security, which any creditor may hold, or be entitled to, for the payment of his debt."

Equitable assets of two kinds.

Equitable assets are of two kinds—

(1.) The first are such as are not attainable by the

[1] *Silk* v. *Prime*, 2 L. C. 95.

executor *virtute officii*, and are solely available in equity by virtue of their nature and character.

(2.) The second are created by the act of the testator, by charging or devising his land for payment of debts.

1. Equitable assets by nature of property itself.

(1.) Equitable assets, which are so by the nature and character of the property, and which are not attainable by the executor, *virtute officii*.

Property actually appointed.

(*a.*) Property over which the testator has exercised a general power of appointment is equitable assets;[1]

Trusts of a chattel.

and so also are trusts of a chattel, as a mere equitable interest in a term, not being affected as trusts of inheritance, by 29 Car. II., c. 3, s. 10.[2] In the case, however, of *Cook* v. *Gregson*,[3] it was held that the equity of redemption of a sum of money charged on land is *legal* assets in the hands of the executor.[4]

Equity of redemption in fee.

Under the law prior to 3 & 4 Will. IV., c. 104, the equity of redemption of an estate in fee simple, whether legal or equitable, would have been equitable and not legal assets;[5] since the last-mentioned act, however, the equity of redemption of a mortgage in fee is made legal assets.[6]

Separate estate.

(*b.*) The separate estate of a woman married before the 9th of August 1870, is administered as equitable assets, all her creditors being paid *pari passu*, because it is only through a court of equity that they can make her separate property available.[7] But where a woman has been married since that date, it may be questioned whether her separate estate is not legal assets, since

[1] *Pardo* v. *Bingham* L. R. 6 Eq. 485.
[2] *Scott* v. *Scholey*, 8 East, 467.
[3] 3 Drew. 547.
[4] *Mutlow* v. *Mutlow*, 4 De G. & J. 539; Wms. on Assets, 6.
[5] *Plunket* v. *Penson*, 2 Atk. 290.
[6] *Foster* v. *Handly*, 1 Sim. N. S. 200.
[7] *Bruere* v. *Pemberton*, cited as Anon. 18 Ves. 258; *Owens* v. *Dickenson*, Cr. & Ph. 48, 53; *Murray* v. *Barlee*, 3 My. & K. 209.

her antenuptial creditors have now a legal remedy against her separate property.[1]

(2.) The second kind of equitable assets is that created by the act of the testator charging or devising his land for payment of debts.[2] 2. Equitable assets by act of testator.

Besides a great difference in the order of administration,[3] to be hereafter noticed, there is an important difference between an *express* devise or appropriation of lands on trust for the payment of debts, and a mere charge of debts. When a trust is created, the conscience of the trustee is affected; the creditor is put under his care, and it becomes the especial duty of the trustee to look after him. It was always the rule of equity that as between trustee and *cestui que trust*, no length of time could be a bar.[4] An apparent exception to this rule occurs in the case of personal estate. If a testator bequeath his personal estate upon an express trust for payment of his debts, the statutes of limitation still run against the creditors. This rule proceeds upon this ground, that the personal estate is, by law, primarily liable to the payment of the debts, and that the testator, by creating such a trust, merely does that which the law already requires. In this case, therefore, equity follows the law, and carries its principles into execution.[5] And if the creditors have merely a charge in their favour, they must look after themselves, and if they neglect to do so, they will be barred after twenty years by the statute of limitation, 3 & 4 Will. IV., c. 27, s. 40.[6]

Charge of debts distinguished from a trust.

In a trust for payment of debts lapse of time no bar.

Except as to personal estate.

In a charge, creditors may be barred by lapse of time.

In order to prevent the injustice, which, previously

[1] Married Women's Property Act 1870 (33 & 34 Vict., c. 93, s. 12).

[2] 3 & 4 Will. IV., c. 104.

[3] *Harmood* v. *Oglander*, 8 Ves. 124.

[4] *Hughes* v. *Wynne*, Turn. & Russ. 309; *Townshend* v. *Townshend*, 1 Cox. 29, 34; 3 & 4 Will. IV., c. 27, s. 25.

[5] *Scott* v. *Jones*, 4 Cl. & Fin. 382; and see 3 & 4 Will. IV., c. 27, s. 40.

[6] *Jacquet* v. *Jacquet*, 27 Beav. 332.

What amounts to a charge of debts.

to the late enactments, would have resulted to creditors, in consequence of a testator neglecting to charge his debts upon his real estate, courts of equity have, by straining the ordinary mode of construction, laid it down as a rule, that a mere general direction by a testator, that his debts should be paid, effectually charges them on his real estate. Thus, in *Leigh* v. *Earl of Warrington*,[1] a testator commenced a will thus :—"As to my worldly estate, which it hath pleased God to bestow upon me, I give and dispose thereof in manner following: (that is to say), *Imprimis*, I will that all my debts which I shall owe at the time of my decease, be discharged and paid out of my estate;" and he then disposed of his real and personal estate, charging the former with an annuity. It was contended that these were merely introductory words, and did not indicate an intention to charge the real estate. But the House of Lords, affirming a decree of Lord King, held the real estate to be charged. And it is not necessary that such expressions should be at the beginning of the will. "I do not think," observed Shadwell, V.-C., in *Graves* v. *Graves*,[2] "that the charge is made to rest on the mere circumstance that the testator has used the words, '*imprimis*,' or, 'in the first place,' for if a testator directs his debts to be paid, is it not in effect a direction that his debts shall be paid in the first instance?"

A general direction by testator for payment of his debts.

Exceptions.

There appear, however, to be two exceptions to this rule—

1. Where testator has specified a particular fund.

1st. Where the testator, after a general direction for the payment of his debts, has specified a particular fund for the purpose; "because the general charge by implication is controlled by the specific charge made in the subsequent part of the will."[3]

[1] 1 Bro. P. C. 511, Toml. ed.
[2] 8 Sim. 55.
[3] *Thomas* v. *Britnell*, 2 Ves. Sr. 313; *Price* v. *North*, 1 Ph. 85.

2nd. Where the debts are directed to be paid by the executors who are not at the same time devisees of the real estate; [1] for, in this case, it will be presumed that the debts are to be paid exclusively out of the assets which come to them as executors.

2. Where executors, not also devisees, are directed to pay the debts.

A direction to raise money for payment of debts out of rents and profits of real estate, will authorise the sale and mortgage of the estate for that purpose.[2]

Debts to be paid out of rents and profits.

Where a person has a direct lien upon the lands as mortgagee or otherwise, his right of priority will not be affected by a charge of debts.[3]

Lien on land not affected by a charge of debts.

Neither debts by specialty, in which the heirs are bound, nor simple contract debts, even since 3 & 4 Will. IV., c. 104, which made the land of a deceased debtor assets, constitute a lien or charge upon the land either in the hand of the debtor, or of his heir or devisee. The latter may alienate the lands before any proceedings are taken by the creditors to make them liable, and in the hands of the alienee, whether upon a common purchase or a settlement, even with notice that there are debts unpaid, the land is not liable, though the heir or devisee remains *personally* liable to the extent of the value of the land.[4]

Neither specialty nor simple contract debts are a lien on the lands.

Even before 32 & 33 Vict., c. 46, where there were only equitable assets, debts by specialty and simple contract were payable thereout *pari passu*.[5] And now in cases falling within the statute both classes of debts rank equally against the assets, whether legal or equitable.

No priority of specialty creditors, in equitable assets or since 32 & 33 Vict., c. 46.

[1] *Cook* v. *Dawson*, 3 De G. F. & J. 127; *Finch* v. *Hattersley*, 3 Russ. 345 *n.*

[2] *Bootle* v. *Blundell*, 1 Mer. 232.

[3] *Child* v. *Stephens*, 1 Vern. 101, 103.

[4] *Morley* v. *Morley*, 5 De G. M & G. 610; *Carter* v. *Sanders*, 2 Drew. 248; *Kinderley* v. *Jervis*, 22 Beav. 1.

[5] *Silk* v. *Prime*, 1 Bro. C. C. 138 *n.*

Legatees postponed to creditors

The maxim that equality is equity, applies only to those persons whose equities are equal as creditors among themselves, and will not be extended to legatees jointly with creditors. Thus, although land may be devised in trust for, or charged with, the payment of debts and legacies, the debts will in all cases have precedence of the legacies, on the ground that a man ought to be just before he is generous.[1]

Order of administration of assets.

The order of administration of assets:—[2]

1. The general personal estate.
2. Estates devised for the payment of debts.
3. Estates descended.
4. Property devised or bequeathed, but charged with the payment of debts.
5. General pecuniary legacies.[3]
6. Specific legacies and real estate specifically devised, not charged with debts, are liable *pro ratâ*.[3]
7. Personalty or realty over which the testator has a general power of appointment, which he has actually exercised.

1. The general personal estate, legal assets.

1. The general personal estate, not expressly or by plain implication exempted, is first liable. This is legal assets, and will be applied in a course of administration in payment of debts, according to their legal priorities.[4]

If the testator has appropriated any specific part of his personal estate for the payment of his debts, and has also disposed of his general residuary personal estate, the part so appropriated will be primarily liable to the payment of the debts. If, however, he has made

[1] *Walker* v. *Meager*, 2 P. W. 551; *Kidney* v. *Coussmaker*, 12 Ves. 154.

[2] 2 Jarm. on Wills, 588.

[3] As to the liability of these classes of property, see observations on *Hensman* v. *Fryer*, post p. 234.

[4] *Ancaster* v. *Mayer*, 1 L. C. 564.

no disposition of his general residuary personal estate, then, notwithstanding such an appropriation, the general residuary personal estate, thus remaining undisposed of, will still remain subject to its primary liability to pay the debts.[1] It requires very strong language on the part of the testator to exonerate his general personal estate from its primary liability to the payment of his debts. Of course, nothing that he can say can deprive his creditors of their legal rights to resort primarily to his personal estate; but as between the several persons to whom his property may be bequeathed or devised, who therefore take as volunteers under him, he may, if he pleases, vary the priorities; but to do this he must show an intention not only to charge his real estate with his debts, but also to exonerate his personal estate therefrom. Thus neither a general charge of the debts upon the real estate, nor an express trust created by the testator for the payment of his debts out of his real estate, or any part thereof,[2] will be sufficient to exonerate the personal estate from its primary liability to pay them. Nor will it alter the case that the charge or trust for payment out of the real estate comprises also the testator's funeral and testamentary expenses,[3] though this circumstance is not without its weight, if there be in the will other indications of an intention to exonerate the personalty. If, therefore, the personal estate be simply given to some legatee, and more particularly if the articles given be specifically mentioned, the indication thus afforded of the testator's wish that the personalty shall come clear to the legatee, will, if coupled with an express trust for payment of the funeral and testamentary expenses out of the real estate, be sufficient to exonerate the personalty.[4] But if the personalty be simply given to the executor, or if the gift be merely

What exonerates the personalty.

Not a general charge or express trust of realty.

Nor even if funeral and testamentary expenses are charged on realty.

Unless personalty be given at same time as a legacy.

[1] *Bootle* v. *Blundell*, 1 Mer. 220.
[2] *Tower* v. *Rous*, 18 Ves. 132; *Collis* v. *Robins*, 1 De G. & Sm. 131.
[3] *Brydges* v. *Phillips*, 6 Ves. 570.
[4] *Greene* v. *Greene*, 4 Mad. 148; *Lance* v. *Aglionby*, 27 Beav. 65.

of the residue of the personal estate, the personal estate will not be exempt.[1] In short, an intention must appear to give the personal estate *as a specific legacy* to the legatee; and if this be the case, it will be exempt, and will be removed to that distant rank in point of liability in which all specific devises and bequests are held to stand." [2]

Personal estate must be given as a specific legacy.

Exoneration of mortgaged estates, 17 & 18 Vict., c. 113.

By Locke King's Act,[3] the rule that the personalty of a testator is the primary fund for the payment of his debts, was broken into with respect to devises of mortgaged land. This act enacts, that when any person shall, after the passing of the act, die, seised of, or entitled to any estate or interest in *any land or other hereditaments*, which shall, at the time of his death, be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not by his will, or deed, or other document *have signified any contrary or other intention*, the heir or devisee to whom such lands or hereditaments shall descend or be devised, shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate, or any other real estate of such person; but the land or hereditaments so charged shall, as between the different persons claiming[4] through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof. Provided that nothing therein contained shall affect or diminish any right of the mortgagee on such lands or hereditaments to obtain full payment or satisfaction of his mortgage debt, either out of the personal estate of the person so dying as aforesaid, or otherwise.

Mortgaged estate primarily liable.

It is proposed briefly to consider—

[1] *Aldridge* v. *Wallscourt*, 1 Ball & B. 312.
[2] Wms. R. Ass. 101.
[3] 17 & 18 Vict., c. 113.
[4] *Dacre* v. *Patrickson*, 1 Dr. & Sm. 186.

I. The law applicable to cases not within the statute.
II. The effect and construction of the act.

I. The law applicable to cases not within the statute.

(*a.*) The personal estate is the primary fund for the payment of the mortgage debt contracted by the deceased person himself, unless he devise the mortgaged estate *cum onere*, or unless the personal estate has been exempted by express words, or by necessary implication.[1]

a. Personalty primarily liable, unless mortgaged estate devised *cum onere.*

(*b.*) If the mortgage debt is not the personal debt of the deceased devisor or ancestor, but of a previous owner of the mortgaged estate, the mortgaged estate is the primary, and the personalty the collateral fund for its payment; hence here the devisee, or heir-at-law, as the case may be, will, unless the mortgage debt has been adopted by the devisor or ancestor as his own, take the estate with the burden, and will not be entitled to call upon the personal estate for exoneration. Though if the ancestor or devisor has adopted the debt as his own, the ordinary rule applies.[2]

b. Mortgaged estate is primary fund when it is debt of ancestor of testator.

Unless adopted as personal debt of testator.

As to what acts do and do not amount to an adoption of the mortgage debt by the owner of the estate, see the cases cited below.[3]

II. The effect and construction of 17 & 18 Vict., c. 113.

(*a.*) It seems that copyholds as well as freeholds are within its provisions; but it is doubtful whether leaseholds are so, for the words of the act are, "The heir

Copyholds and freeholds are within the

[1] *Davies* v. *Bush*, 4 Bligh. N. S. 305 & note; *Townshend* v. *Mostyn*, 26 Beav. 72, 76; *Newhouse* v. *Smith*, 2 Sim. & Giff. 344.
[2] *Scott* v. *Beecher*, 5 Mad. 96.
[3] *Evelyn* v. *Evelyn*, 2 P. Wms. 659; *Hedges* v. *Hedges*, 5 De G. & Sm. 330; *Bagot* v. *Bagot*, 13 W. R. 169; *Swainson* v. *Swainson*, 6 De G. M. & G. 648; *Bond* v. *England*, 2 K. & J. 44; *Looscmore* v. *Knapman*, Kay, 123.

statute, *quære* as to leaseholds.

or devisee to whom such lands or hereditaments shall *descend* or *be devised.*"[1]

Act refers only to specified charges.

(*b.*) The words "sums by way of mortgage," have been held to apply only to a defined or specified charge on a specified estate;[2] they are applicable also to an equitable mortgage of freeholds by deposit of title-deeds and memorandum.[3] It was held that the act did not apply to a vendor's lien for unpaid purchase-money,[4] but now by the explanatory act, 30 & 31 Vict., c. 69, s. 2, it is enacted that the word "mortgage" shall be deemed to extend to any lien for unpaid purchase-money, on any lands or hereditaments purchased by a testator.

Vendor's lien under 30 & 31 Vict., c. 69.

"Contrary or other intention."

(*c.*) What is a "contrary or other intention" within the meaning of the act? The cases on this subject have been somewhat conflicting; but the current of authority seems to be *against* the rule laid down as follows by Lord Campbell, in *Woolstoncroft* v. *Woolstoncroft*:[5]—"I think the same rule should now be observed with respect to exempting the mortgaged land from the payment of the mortgage money, as was before observed, with respect to exempting the personal estate, the mortgaged land being now primarily liable."

Eno v. *Tatham.*

In *Eno* v. *Tatham*,[6] Turner, L. J., said, "The appellant's counsel has relied on the dictum of Lord Campbell in *Woolstoncroft* v. *Woolstoncroft*, that the rule which had been before observed with respect to exempting personal estate should now be observed with respect to exempting the mortgaged land from the payment of the mortgage money. This probably meant no more than that the intention should

[1] *Piper* v. *Piper*, 1 J. & H. 91.
[2] *Hepworth* v. *Hill*, 30 Beav. 476.
[3] *Pembroke* v. *Friend*, 1 J. & H. 132.
[4] *Hood* v. *Hood*, 5 W. R. 747; *Barnwell* v. *Iremonger*, 1 Dr. & Sm. 255, 260.
[5] 2 De G. F. & Jo. 347.
[6] 11 W. R. 475.

be clearly proved. If Lord Campbell intended to say that as before the act it had been necessary to show an intention not only to charge the mortgaged estate, but also to discharge the personalty, so now it is necessary to show an intention, not only that another fund should be charged, but also that the mortgaged estate should be discharged, he (the Lord Justice) was not prepared to follow him. In order to take a case out of the act, it was sufficient to show a contrary or other intention; this destroyed the analogy between the two cases. In the one case, the intention to be proved was contrary to a settled rule of law; in the other case, it was contrary only to a statutory rule, expressly made dependent upon intention. . . . His opinion coincided with those cases in which it had been held that the mortgaged estates were not liable where there was a direction that the debt should be paid out of some other fund."

Mortgaged estate exonerated, if there is a direction to pay debts out of another fund.

It has been decided that a mere direction by the testator that the debts "shall be paid as soon as may be,"[1] or that debts should be paid by "his executors out of his estate,"[2] the source from which payment is to be made not being mentioned, will not show a contrary or other intention sufficient to exonerate the mortgaged estate from its primary liability. Where, however, the *personal* estate is bequeathed on trust to pay,[3] or subject to the payment of debts,[4] these words have been held sufficient to show a contrary intention within the meaning of the act so as to charge the personalty primarily with the payment of the mortgaged debts on estates devised by the will.

But not a mere general direction for payment of debts.

But now by 30 & 31 Vict., c. 69, an act to explain the act of 17 & 18 Vict., c. 113, in the construction of

[1] *Pembroke* v. *Friend*, 1 J. & H. 132; *Coote* v. *Lowndes*, L. R. 10 Eq. 376.

[2] *Woolstoncroft* v. *Woolstoncroft* 2 De G. F. & Jo. 347.

[3] *Moore* v. *Moore*, 1 De G. Jo. & Sm. 602.

[4] *Mellish* v. *Vallins*, 2 J. & H. 194.

Under 30 & 31 Vict., c. 69, the intention to charge the personalty must be expressed or necessarily implied.

the will of any person, who may die after the 31st day of December 1867, a general direction that the debts or all the debts of the testator shall be paid out of his personal estate, shall not be deemed to be a declaration of an intention contrary to, or other than the rule established by the last mentioned act, unless such contrary or other intention shall be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt, charged by way of mortgage on any part of his real estate.

2. Lands expressly devised for payment of debts equitable assets.

2. Lands devised to pay debts, not merely charged with debts, are liable after the personalty.[1] These are equitable assets, and applicable in payment of debts by specialty and simple contract *pari passu.*

3. Realty descended, legal assets.

3. Real estates which have descended to the heir, but not charged with debts, are next liable.[2] These are legal assets liable to debts by specialty, but not before 47 Geo. III., c. 74, and 3 & 4 Will. IV., c. 104, to debts by simple contract.

Devise to heir makes him a purchaser.

Since the act[3] for the amendment of the law of inheritance, when land is devised to the heir, he takes not as heir but as purchaser, and as such is placed in the same position in all respects as any other devisee.[4]

4. Realty devised charged with debts, equitable assets.

4. Real estate devised, charged with the payment of debts, are next liable.[5] These are equitable assets, and debts are payable out of them *pari passu.*

[1] *Harmood* v. *Oglander*, 8 Ves. 125; *Phillips* v. *Parry*, 22 Beav. 279.

[2] *Davies* v. *Topp*, 1 Bro. C. C. 527; *Manning* v. *Spooner*, 3 Ves. 117; *Milnes* v. *Slater*, 8 Ves. 304; *Wood* v. *Ordish*, 3 Sm. & Giff. 125.

[3] 3 & 4 Will. IV., c. 106.

[4] *Biedermann* v. *Seymour*, 3 Beav. 368; *Strickland* v. *Strickland*, 10 Sim. 374.

[5] *Barnewell* v. *Lord Cawdor*, 3 Mad. 453; *Irvin* v. *Ironmonger*, 2 Russ. & My. 531.

If the heir takes, by reason of a lapsed devise or otherwise, land simply charged with debts, the land so charged is applicable for payment of debts in the same order as devised estates, and not till after the real estates which had descended.[1] Heir taking a lapsed devise.

Land devised, subject to a mortgage, and which are not within the 17 & 18 Vict., c. 113, are next liable, so far as regards the mortgage debt.[2] The court gives a right of marshalling to a general pecuniary legatee as against the devisee of real estate subject to a mortgage, so that if the mortgagee chose to resort to the personalty for payment of his mortgage debt, the pecuniary legatee had a right to stand in the shoes of the mortgagee, as against the mortgaged estate, even though specifically devised. And the rule is the same where the estate is devised subject to a lien for unpaid purchase-money.[3] Lands devised subject to a mortgage. Or lien for unpaid purchase-money.

Since the passing of the Wills Act, a question has arisen as to the relative liabilities, of lands comprised in a residuary and a specific devise, to the payment of debts; in short, whether, as before the act, a residuary devise is still to be deemed specific. This question, after a great conflict of authorities, may now probably be considered as settled by the case of *Hensman* v. *Fryer*,[4] decided on appeal by Lord Chelmsford, who there, reversing the decision of Vice-Chancellor Kindersley, decided that a residuary devise was still specific on the following grounds. "Whether the will be made before or after the act," said his Lordship, "the testator knows equally well what real estate he possesses, and in both, the whole not previously disposed of is embraced by the residuary devise. Why then should A residuary devise now probably specific.

[1] *Wood* v. *Ordish*, 3 Sm. & Giff. 125.
[2] *Lutkins* v. *Leigh*, Cas. t. Talb. 53.
[3] *Lord Lilford* v. *Powys-Keck*, L. R. 1 Eq. 347; but see *Wythe* v. *Henniker*, 2 My. & K. 635.
[4] L. R. 3 Ch. 420; *Gibbins* v. *Eyden*, L. R. 7 Eq. 371; 2 Jarm. on Wills, 589.

the gift be regarded as specific in the one case, and not in the other? In either case it is the essentially precise and definite nature of the subject of the devise which gives it its specific character, and not the scope and extent of its operation."

5. General pecuniary legacies.

5. General pecuniary legacies *pro ratâ*[1] are next liable.

6. Specific legacies and devises *pro ratâ*.

6. Specific legacies[2] and real estates specifically devised, not charged with the payment of debts,[3] are liable *pro ratâ* to contribute to the payment of debts by specialty, in which the heirs are bound,[4] and also it is conceived to the payment of debts by simple contract and by specialty in which the heirs are not bound.[5]

Hensman v. *Fryer*.

In the above-mentioned case of *Hensman* v. *Fryer*, after deciding that a residuary devise was still specific, Lord Chelmsford further held, that pecuniary legatees were entitled to call on residuary devisees to contribute rateably to the payment of debts, which the general personal estate was insufficient to satisfy. The effect of this decision is apparently to place general pecuniary legacies in the same rank with specific legacies and devises, and to overrule a long series of authorities, decided, as well by courts of appeal, as of first instance, which lay down, that the special intention shown by the testator to benefit donees of specific portions of his property, entitled them to stand in a remoter rank, than those towards whom he had shown but a general intention of bounty.[6] The decision on this latter

[1] *Clifton* v. *Burt*, 1 P. W. 680; *Headley* v. *Redhead*, Coop. 50.

[2] *Fielding* v. *Preston*, 1 De G. & Jo. 438; *Evans* v. *Wyatt*, 31 Beav. 217.

[3] *Mirehouse* v. *Scaife*, 2 My. & Cr. 695; *Milnes* v. *Slater*, 8 Ves. 303.

[4] *Tombs* v. *Roch*, 2 Coll. 490; *Gervis* v. *Gervis*, 14 Sim. 655.

[5] *Collis* v. *Robins*, 1 De G. & Sm. 131.

[6] 2 W. & T. 253; *Clifton* v. *Burt*, 1 P. Wms. 678; *Fielding* v. *Preston*, 1 De G. & Jo. 438.

point has since been doubted,[1] and must, it is submitted, be considered as open to question.

7. Real or personal property over which the testator has *general* power of appointment, and over which he has *actually* exercised that power,[2] by deed, or will in favour of volunteers; in this case the property appointed will in equity form part of his assets, so as to be subject to the demands of his creditors in preference to the claims of his legatees or appointees; but as a court of equity never aids the non-execution of a power, the power must be actually executed in order that equity may thus interpose in favour of creditors.[3]

7. Property over which testator has exercised a general power of appointment.

Equity will not aid the non-execution of a power.

The results of the chapter may be thus summed up in the words of a learned writer. "The order in which we have seen that the various portions of a testator's estate are applied for the payment of his debts, has been established out of regard to the testator's intention. The general personal estate was long the only fund to which those creditors who had not specialties binding the heir could resort; and besides, cash, stock, and movables come first to hand, and are the most readily applicable, and are the funds out of which people in their lifetime usually pay their debts. It cannot therefore be matter of surprise that in the absence of any express direction to the contrary, the general personal estate should be held primarily liable to the payment of the debts of the deceased. Next after that, any special fund set apart by the testator would naturally come. The heir not being a beneficiary within the testator's intention, lands descended to him would properly follow next in

The testator's intention is the guide.

Reasons why personalty is primarily liable.

[1] *Collins* v. *Lewis*, L. R. 8 Eq. 708.

[2] *Fleming* v. *Buchanan*, 3 De G. M. & G. 976; *Hawthorn* v. *Shedden*, 3 Sm. & Giff. 305; *Pardo* v. *Bingham*, L. R. 6 Eq. 485.

[3] *Holmes* v. *Coghill*, 7 Ves. 499, 12 Ves. 206; *Vaughan* v. *Vanderstegen*, 2 Drew. 165.

order of application. But lands charged with the payment of debts would, of course, be applicable before legacies bequeathed, or property specifically given. Again, there seems a more direct intention to benefit a specific devisee or legatee than to benefit the legatee of a mere pecuniary legacy. Pecuniary legacies must therefore go unpaid rather than that specific devisees or bequests shall be touched. These, however, must be resorted to as a last resource; whilst lands over which the testator may have exercised a *general* power of appointment are in favour of creditors, considered as supplementarily applicable after the whole of his own property shall have been exhausted."[1]

Intention to benefit shown more clearly in a specific than in a general legacy.

[1] Wms. Real Assets, 108.

CHAPTER XV.

MARSHALLING ASSETS.

Creditors may resort to any fund first.

It must not be forgotten that the order in which the several funds liable to debts are to be applied regulates the administration of the assets only among the testator's own representatives, devisees, and legatees, and does not affect the right of the creditors themselves to resort, in the first instance, to all or any of the funds to which their claims extend. It may therefore happen that a creditor having a claim on two or more funds proceeds against them in a different order from that which the testator intended, or proceeds against some fund which is the only resource of some other creditor, less amply armed than himself. Equity will then hold that the creditor having two funds shall not, by resorting to that fund, which is the only resource of another creditor, disappoint that other; but will permit that other creditor to stand in his place for so much, against the fund, to which otherwise he could not have access, the object of the court being that all claimants shall be satisfied, so far as, by any arrangement consistent with the nature of the several claims, the property which they seek to affect can be applied in satisfaction of such claims.[1]

Principle of marshalling explained.

It is proposed to examine a few of the cases in which equity carries out this principle.

As between creditors. Under old law simple con-

Under the old law, before 3 & 4 Will. IV., c. 104, simple contract creditors had no claim upon the real assets of a deceased person, unless charged with, or

[1] *Aldrich* v. *Cooper*, 2 L. C. 66.

tract creditors permitted to stand in shoes of specialty creditors as against the realty.

devised for the payment of debts. In this case specialty creditors, who might in the first instance resort to the personal estate, in priority to simple contract creditors, and also to the real assets, in exclusion of the simple contract creditors, would be compelled in equity to resort for the satisfaction of their debts, in the first place, to the real assets, as far as they went, so as to leave the personalty for the simple contract creditors; or if the specialty creditors had already exhausted the personal assets in payment of their claims, the simple contract creditors would be put to stand in their place against the real assets, whether devised or descended, as far as the specialty creditors might have exhausted the personal assets.

In *Aldrich* v. *Cooper*,[1] decided before 3 & 4 Will. IV., c. 104, a mortgagee of freehold and copyhold estates, who was also a specialty creditor, having exhausted the personal assets, simple contract creditors were held entitled to stand in his place, both against the freehold and copyhold estates, so far as the personal estate was taken away from them by such specialty creditor. And in *Selby* v. *Selby*,[2] it was decided that if the vendor of an estate, the contract for which was not completed in the lifetime of the testator who was the purchaser, is afterwards paid his purchase-money out of the personal assets, the simple contract creditors of the testator shall stand in the place of the vendor, with respect to his lien on his estate sold, against the devisee of that estate.

Realty now assets for payment of all debts, 3 & 4 Will. IV., c. 104.

Freehold and copyhold estates being now under 3 & 4 Will. IV., c. 104, liable to simple contract debts, the court is no longer under the necessity of resorting to the doctrine of marshalling to enforce their payment.[3] And the recent statute 32 & 33 Vict., c. 46, having

[1] 2 L. C. 66.
[2] 4 Russ. 336.
[3] *Cradock* v. *Piper*. 15 Sim. 301; *Gwynne* v. *Edwards*, 2 Russ. 289 *n*.

abolished the priority of specialty over simple contract debts in the administration of the estates of all persons dying after the 1st of January 1870, will for the future render questions of marshalling as between creditors of little practical importance.

Priority of specialty creditors abolished, 32 & 33 Vict., c. 46.

Marshalling will not, unless founded on some equity, be enforced between persons, unless they are creditors of the same person, and have demands against funds the property of the same person. "It was never said," observed Lord Eldon, "that if I have a demand against A. and B., a creditor of B. shall compel me to go against A., without more ; . . . . but if I have a demand against both, the creditors of B. have no right to compel me to seek payment from A., if not founded on some equity, and giving B. the right for his own sake to seek payment from A." [1]

No marshalling except between creditors of the same person.

Although with the exception of necessary wearing apparel,[2] a widow's paraphernalia are liable to her deceased husband's debts, she will be preferred to a general legatee, and be entitled therefore to marshal assets in all cases in which a general legatee would be entitled to do so.[3] It does not seem to be settled whether a widow, as to her paraphernalia, is to be deemed in the nature of a simple contract creditor, and as such, entitled to precedence over specific legatees or devisees.[4] But both principle and the weight of authority point to the conclusion that a widow, as to paraphernalia, is entitled to rank as a simple contract creditor.[5]

Widow's paraphernalia preferred to a general legacy.

Quære as to her preference over specific legatee.

If the heir-at-law has paid any debts, which ought to have been paid, first, out of the general personal

Right of heir as to descended land.

[1] *Ex parte Kendall*, 17 Ves. 520.
[2] *Lord Townshend* v. *Windham*, 2 Ves. Sr. 7.
[3] *Tipping* v. *Tipping*, 1 P. W. 730 ; *Boynton* v. *Parkhurst*, 1 Bro. C. C. 576.
[4] *Lord Townshend* v. *Windham*, 2 Ves. Sr. 7 ; *Probert* v. *Clifford*, Amb. 6 ; *Graham* v. *Londonderry*, 3 Atk. 395.
[5] Wms. Real Assets, 118.

estate, secondly, out of lands subject to a trust or power for their payment, he will have a right to have the assets marshalled in his favour, as against those two funds, but not to the prejudice of pecuniary legatees; still less to the disappointment of specific gifts; for the heir is not a devisee, while the general or specific legatees take by the special bounty of the testator.[1]

Devisee of lands charged with debts.

A devisee of lands charged with the payment of debts paying any debts whilst any of the previously liable property remains unexhausted, will have a right to have the assets marshalled in his favour, and to stand in the place of the creditor so far as regards, 1st, the general personal estate; 2nd, lands subject to a trust or power for raising the debts; 3rd, lands descended to the heir.[2]

Position of a residuary devisee.

Since the decision of Lord Chelmsford in *Hensman* v. *Fryer*,[3] it will probably be held that for purposes of marshalling residuary devisees stand in the same position as specific legatees or devisees.

Against whom pecuniary legatees may marshal.

Pecuniary legatees, if the personal estate out of which they are to be paid has been exhausted by creditors, are entitled to be paid—

(*a.*) Out of lands which descend to the heir.[4]

(*b.*) Out of lands devised simply subject to debts.[5]

(*c.*) Out of lands subject to a mortgage to the extent to which the mortgagee may have disappointed them by resorting first to the personal estate.[6]

But the balance of authority seems to be against the right of pecuniary legatees to marshal against lands comprised in a residuary devise, no less than against specific legatees and devisees.[7]

[1] *Hanby* v. *Roberts*, Amb. 128.
[2] *Harmood* v. *Oglander*, 8 Ves. 106.
[3] L. R. 3 Ch. 420; *Gibbins* v. *Eyden*, L. R. 7 Eq. 371.—See page 233 *supra*.
[4] *Sproule* v. *Prior*, 8 Sim. 189.
[5] *Rickard* v. *Barrett*, 3 K. & J 239.
[6] *Johnson* v. *Child*, 4 Hare, 87.
[7] Page 234 *supra*.

Specific legatees and devisees.

In this view of the law, specific legatees and devisees have a right, if called on to pay any debts of their testator, to have the whole of his other property real and personal marshalled in their favour, so as to throw the debts as far as possible on the other assets, which are antecedently liable.

Contribute rateably, *inter se.*

A specific devisee and a specific legatee contribute *pro ratâ* to satisfy the debts of the testator, which the property antecedently liable has failed to satisfy, for the testator's intention of bounty is equal in both cases.[1]

If specific devisee or legatee take subject to a burden, he cannot compel the others of the same class to contribute.

If, however, the subject of any specific devise or bequest is liable to any burden of its own, the legatee must bear it alone, and cannot call the others to his aid. Thus the devisee of land bought by the testator but not paid for, cannot call on the other specific devisees or legatees to pay a proportion of the purchase-money to which his land is subject by reason of the vendor's lien, although he may claim to have his land exonerated at the expense of every one else taking property antecedently liable.[2]

Marshalling between legatees, where certain legacies are charged on real estate.

There is yet another case in which equity, out of regard to the testator's intention, marshals assets in favour of legatees. This case, however, does not depend on the same principle as those we have already mentioned; it does not arise in consequence of a creditor having taken some part of the assets out of their usual order, but simply from the presumption that when a testator leaves legacies, he wishes that, if possible, they should all be paid. If, therefore, he should leave certain legacies payable only out of his personal estate, and certain others which he has charged on his real estate, in aid of his personalty, and the personalty should not be sufficient to pay the whole, equity will marshal these legacies, so as to throw those

[1] *Tombs* v. *Roch*, 2 Coll. 490.

[2] *Emuss* v. *Smith*, 2 De G. & Sm. 722.

charged on the real estate entirely on that estate, in order to leave more of the personalty applicable to the payment of the other legacies.[1]

Where a legacy charged on real estate fails, assets not marshalled.

But where the charge of a legacy upon real estate fails to affect it, in consequence of an event happening subsequent to the death of the testator, as the death of the legatee before the time of payment, the court will not marshal assets so as to turn such legacy upon the personal estate, in which case it would be vested and transmissible, whereas as against the real estate it would sink by the death of the legatee.[2]

Assets not marshalled in favour of charities.

The assets are never marshalled in favour of legacies given to charities, upon the ground that a court of equity is not warranted in setting up a rule of equity contrary to the common rules of the court merely to support a bequest which is contrary to law. If, therefore, a testator should bequeath to a charity a legacy payable out of the produce of his real and personal estate,[3] or a simple legacy without expressly charging it on that part of his personal estate which he may lawfully bequeath to charitable uses, the legacy will fail by law in the proportion which the real estate and personalty in the one case, or such personalty in the other may bear to the whole fund out of which the legacy was made payable;[4] or, as Lord Cottenham has expressed himself in *Williams* v. *Kershaw*,[5] "The rule of the court adopted in all such cases is, to appropriate the fund as if no legal objection existed as to applying any part of it to the charity legacies, then holding so much of the charity legacies to fail as would in that way be to be paid out of the prohibited fund."

[1] *Bonner* v. *Bonner*, 13 Ves. 379; *Scales* v. *Collins*, 9 Hare, 656, Wms. Real Assets, 115.

[2] *Prowse* v. *Abingdon*, 1 Atk. 482; *Pearce* v. *Loman*, 3 Ves. 135.

[3] *Currie* v. *Pye*, 17 Ves. 462.

[4] *Robinson* v. *Geldard*, 3 Mac. & G. 735; *Fourdrin* v. *Gowdey*, 3 My. & K. 397; *Johnson* v. *Lord Harrowby*, Johns. 425; *Hobson* v. *Blackburn*, 1 Kee. 273.

[5] Kee. 275 *n*.

CHAPTER XVI.

MORTGAGES.

A LEGAL mortgage may be defined to be a debt by specialty, secured by a pledge of lands of which the legal ownership is vested in the creditor, but of which, in equity, the debtor and those claiming under him, remain the actual owners, until debarred by judicial sentence, by legislative enactment, or by their own laches.[1] It is a security founded on the common law, and perfected by a judicious and wise application of the principles of equity. It will, therefore, be necessary, first, to show what is the effect of a mortgage at common law, and then to show how equity has modified or altered the common law to suit the ends of practical justice. The ordinary mortgage, or *mortuum vadium*, as it was called, was strictly an estate upon condition; that is, a feoffment of the land was made to the creditor, with a condition in the deed of feoffment, or in a deed of defeazance executed at the same time, by which it was provided that on payment by the mortgagor, or feoffor, of a given sum at a time and place certain, it should be lawful for him to re-enter. Immediately on the livery made, the mortgagee or feoffee became the legal owner of the land, and in him the legal estate instantly vested, subject to the condition. If the condition was performed, the feoffor re-entered and was in of his old estate. If the condition was broken the feoffee's estate became absolute and indefeasible, and all the legal consequences followed, as though he had been absolute owner from the time of his feoffment.[2]

Definition of mortgage.

Mortgage at common law.

An estate upon a condition.

Forfeiture at law on condition broken.

[1] Coote, 1.

[2] Coote, 6.

Thus mortgages stood at common law, encumbered with the system from which they originated, and attended with ruinous consequences to the unfortunate debtor. The forfeiture was complete; the mortgagee, by the default of the mortgagor, had become the absolute owner of the estate; it could not be divested from him without a reconveyance, and there remained no remedy short of an actual legislative enactment, without disturbing the settled landmarks of property.[1]

Interference of equity.

Happily, a jurisdiction arose, under which the harshness of the common law was softened without an actual interference with its principles, and a system was established, at once consistent with the security of the creditor, and a due regard for the interests of the debtor.[2] Our courts of equity, borrowing the doctrines of the civil law, did not indeed attempt to alter the legal effect of the forfeiture at common law; they could not, as they might have wished, in conformity with the principles of the civil law, declare that the conveyance should, notwithstanding forfeiture committed, cease at any time before sentence of foreclosure, on payment of the mortgage money; but leaving the forfeiture to its legal consequences, they operated on the conscience of the mortgagee, and acting *in personam* and not *in rem*, they declared it unreasonable that he should retain for his own benefit what was intended as a mere pledge, and they adjudged that a breach of the condition was in the nature of a penalty which ought to be relieved against, and that the mortgagor had an "equity to redeem," on payment, within reasonable time, of principal, interest, and costs, notwithstanding the forfeiture at law. Against the introduction of this novelty the common law judges strenuously opposed themselves, and though ultimately defeated by the increasing power of equity, they, nevertheless, in their own courts, still adhered to the

Equity operated on the conscience of the mortgagee.

Mortgage held a mere pledge.

Mortgagor's equity to redeem, notwithstanding forfeiture at law.

[1] Coote, 9.

[2] Coote, 9.

rigid doctrine of forfeiture, and in the result, the law of mortgage fell almost entirely within the jurisdiction of equity.[1]

Mortgages an exception to the maxim, *modus et conventio vincunt legem.*

No sooner, however, was this equitable principle established, than the cupidity of creditors induced them to attempt its evasion, and it was a bold but necessary decision of equity that the maxim of law, *modus et conventio vincunt legem*, was inapplicable—

Debtor cannot at time of loan part with his right to redeem.

that the debtor could not even by the most solemn engagements entered into *at the time of the loan*, preclude himself from his right to redeem. The courts, looking always at the intent, rather than the form of things, disregarded all the defences by which the creditor surrounded himself, and laid down as plain and invariable rules,[2] that it was inequitable that the creditor should obtain a collateral or additional advantage through the necessities of his debtor, beyond the payment of principal, interest, and costs,[3] and they established as principles not to be departed from, that

"Once a mortgage always a mortgage."

"once a mortgage always a mortgage;" that an estate could not at one time be a mortgage, and at another time cease to be so, by one and the same deed; and that whatever clause or covenant there may be in a conveyance, yet, if upon the whole it appear to have been the intention of the parties that such conveyance shall only be a mortgage, or pass an estate redeemable, a court of equity will always construe it so.[4] These rules, however, did not prevent a mortgagee agreeing with the mortgagor for a preference of pre-emption in case of a sale.[5]

Pre-emption.

And this rule must also be distinguished from that

[1] Coote, 10.

[2] *Bonham* v. *Newcomb*, 2 Vent. 364; *Howard* v. *Harris*, 1 Vern. 191.

[3] *Chambers* v. *Goldwin*, 9 Ves. 254; *Leith* v. *Irvine*, 1 My. & K. 277; *Broad* v. *Selfe*, 11 W. R. 1036.

[4] Coote, 11; *Jennings* v. *Ward*, 2 Vern. 520.

[5] *Orby* v. *Trigg*, 9 Mod. 2; *Cookson* v. *Cookson*, 8 Sim. 529.

Conveyance with option of re-purchase.

governing a class of cases where there is an absolute *bonâ fide* sale and conveyance with a collateral agreement for re-purchase, and re-conveyance, on re-payment of the purchase-money within a stipulated time,[1] and such collateral agreement may either be introduced into the agreement for sale at the time, or may be made at a subsequent period. There is no positive rule of law furnishing a criterion by which to distinguish a mortgage from such a conveyance. Whether a given transaction is of the one kind or the other, depends on the special circumstances of each case; and parol evidence will always be admitted to show that what appears on the face of it to be an absolute conveyance was intended to be a conveyance by way of mortgage only.[2] "If the money paid by the grantee would be a grossly inadequate price for the absolute purchase of the estate; if he was not let into immediate possession of the estate; if he accounted for the rents to the grantor, and only retained an amount equivalent to interest; or if the expense of preparing the deed of conveyance was borne by the grantor, each of these circumstances has been considered as evidence, showing with more or less cogency that the conveyance was only intended merely by way of security;"[3] and it must be remembered that the difference between a transaction by way of sale, with a right of re-purchase, and a mortgage, is very important with reference to the consequences of each. Whereas, in a mortgage, even after forfeiture by law, the mortgagor has his right of redemption in equity, in the case of a sale with a right of re-purchase, the time limited ought precisely to be observed, and there is no principle on which the court can relieve, if it is not so observed.[4] And there is also

Circumstances distinguishing a mortgage from a sale.

Parol evidence admitted.

Effects of this distinction.

In a sale with right of re-purchase, time is strictly to be observed.

[1] *Alderson* v. *White*, 2 De G. & Jones, 97.

[2] *Maxwell* v. *Montacute*, Prec. Ch. 526; *Barnhart* v. *Greenshields*, 9 Moo. P. C. C. 18; *Douglas* v. *Culverwell*, 3 Giff 251.

[3] Powell on Mortgages, by Coventry, 125 *a.*; *Brooke* v. *Garrod*, 3 K. & J. 608, 2 De G. & Jo. 62; *Williams* v. *Owen*, 5 My. & Cr. 303.

[4] *Barrel* v. *Sabine*, 1 Vern. 268.

another important difference—that in the case of a sale, with an option to re-purchase, if the purchaser die seised, and then the right of re-purchase be exercised, the money would go to the real representative, not to the personal representatives, as in the case of a mortgage.[1]

In a sale with right of re-purchase, if purchaser die seised, money goes to real representative.

There is also another class of cases where, though a mortgage may be made, the equity of redemption is confined only to the mortgagor, and not extended as in ordinary mortgages to his heirs also. This class of cases arises, where the conveyance of an estate to a person by way of mortgage, is intended to be in the nature of a family settlement.[2]

Mortgages by way of family settlement.

Besides these, there are several other species of securities for money which do not take the form of an ordinary mortgage. Thus,

1. The owner of an estate in consideration of money conveys it to the lender, with a condition that as soon as he, the lender, should have repaid himself out of the rents and profits of the land, the principal and interest of the money, the debtor might re-enter. This is said to have been called a *vivum vadium*, because as the pledge itself destroyed the debt it might be deemed to possess a sort of vitality. It seems now to have entirely ceased.[3]

1. *Vivum vadium.* Lender to pay himself from rents and profits.

2. The *mortuum vadium* was another species. According to Glanville,[4] the *mortuum vadium* was a feoffment to the creditor and his heirs, to be held by him until his debtor paid him a given sum, and until which he received the rents without account, so that the estate was unprofitable or dead to the mortgagor

2. *Mortuum vadium.* Creditor took rents and profits without account.

[1] *Thornborough* v. *Baker*, 2 L. C. 935; *St John* v. *Wareham*, cited 3 Swanst. 631.

[2] *Bonham* v. *Newcomb*, 1 Vern. 214, 232.

[3] Coote, 4.

[4] Lib. 10, c. 6.

in the meantime, the original debt remaining undiminished by the perception by the mortgagee of the rents and profits. It must be observed that there was the like advantage, in one respect, to the debtor in this form of mortgage as in the *vivum vadium*, viz., that the estate was never lost.[1]

Estate never lost.

3. Welsh mortgage.

3. This *mortuum vadium* closely resembles the form of mortgage called a Welsh mortgage, in which the rents and profits were received by the mortgagee as an equivalent for the interest, while the principal remained undiminished.[2] In a Welsh mortgage there is no contract express or implied between the parties for the repayment; the mortgagee cannot foreclose or sue for the money, though the mortgagor and his heirs may redeem at any time.[3]

Mortgagor may redeem at any time.

The *vivum vadium* has been said to be in the nature of a Welsh mortgage, but very incorrectly; the only points of resemblance between them are that the estate is never forfeited, and that the time for the payment of the principal debt is indefinite.

Modern mortgage.

There is no trace of the period when the ancient *mortuum vadium* fell into disuse. In its stead arose the *mortuum vadium* or mortgage so well known at common law, the modern form of mortgage, which may be shortly defined as an estate upon a condition.[4] It is the old *vivum vadium* when the mortgagee is in possession, for he is then accountable in equity for the rents and profits.

The nature of an equity of redemption.

In early times, it was said that an equity of redemption was a mere *right;* but in *Casborne* v. *Scarfe*,[5] Lord Hardwicke laid it down that the equity was an

[1] Coote, 5.
[2] Coote, 4.
[3] *Howell* v. *Price*, Prec. Ch. 423, 477, and see 1 Ves. Sr. 405.
[4] Coote, 5; Litt. sec. 332.
[5] 2 L. C. 940; 1 Atk. 603.

estate in the land, and the mortgagor entitled to it as the real owner of the land, for the land is considered only as a pledge or security for the money. It follows, therefore, that the person entitled to the equity of redemption, being considered in equity the real owner of the land, may exercise all such rights and acts of ownership over the encumbered land as he might have exercised over the land unencumbered, subject, of course, to the rights of the mortgagee or incumbrancer. The mortgagor therefore might settle, or devise, or mortgage the land subject to the mortgagee's incumbrance.[1]

An estate in the land over which the mortgagor has full power, subject to the incumbrance.

It follows also from the principle that an equity of redemption is an estate, that its line of devolution must in the course of descent be governed, as the land itself would have been, by the general law, or by the *lex loci;* and therefore if the land be of gavelkind tenure, the equity of redemption will be divisible in like manner, or if the tenure be borough-English, the youngest son will be entitled.[2]

Devolution of equity of redemption same as of the land.

The equity of redemption being an estate in land, persons entitled to certain interests in that equity are entitled before foreclosure to come into a court of equity and to redeem.[3] As,

Who may redeem.

(*a.*) The heir.[4]

(*b.*) The devisee of the equity of redemption.[5]

(*c.*) A tenant for life, a remainder man, a reversioner, a doweress, a jointress, a tenant by the courtesy.[6]

(*d.*) An assignee.[7]

[1] *Casborne* v. *Scarfe*, 1 Atk. 603; *Marsh* v. *Lee*, 1 L. C., 550.

[2] Coote, 26; *Fawcett* v. *Lowther*, 2 Ves. Sr. 301.

[3] 2 Sp. 660–663.

[4] *Pym* v. *Bowreman*, 3 Swanst. 241, *n.*

[5] *Lewis* v. *Nangle*, 2 Ves. Sr. 431.

[6] 2 L. C. 967.

[7] Anon. 3 Atk. 314.

(*e.*) A subsequent mortgagee making the mortgagor a party to the bill.[1]

(*f.*) Judgment creditors.[2]

(*g.*) The crown, or the lord on forfeiture.[3]

(*h.*) A volunteer, although claiming under a deed fraudulent and void, under 27 Eliz., c. 4, as against the mortgagee *quoad* his mortgage, as to which he is a purchaser.[4]

Every person who has a right to redeem the mortgage may redeem any prior encumbrancer on payment of principal, interest, and costs due to him; the redeeming party being also liable to be redeemed by those below him, who are all liable to be redeemed by the mortgagor.[5]

Time to redeem.

A person cannot redeem before the time appointed in the mortgage deed, although he tenders to the mortgagee both the principal and the interest due up to that time.[6]

If, after the day fixed for the payment of the money is passed, the mortgagor should wish to pay off the mortgage, he must give to the mortgagee six calendar months' previous notice in writing of his intention so to do, and must then punctually pay or tender the money at the expiration of the notice;[7] for if the money should not be then ready to be paid, the mortgagee will be entitled to fresh notice; as it is only reasonable that he should have time afforded him to look out for a fresh security for his money.[8]

Previous to the new statute of Limitations, 3 & 4

[1] *Fell* v. *Brown*, 2 Bro. C. C. 278.
[2] *Stonehewer* v. *Thompson*, 2 Atk. 440.
[3] *Lovell's Case*, 1 Ed. 210; *Downe* v. *Morris*, 3 Hare, 394.
[4] *Rand* v. *Cartwright*, 1 Ch. Ca. 59.
[5] 2 Sp. 665.
[6] *Brown* v. *Cole*, 14 Sim. 427.
[7] *Shrapnell* v. *Blake*, 2 Eq. Ca. Ab. 603.
[8] Wms. R. Prop. 411.

Will., c. 27, the rule established was, as stated by Lord Hardwicke, in general, analogous to the old statute of Limitations, 21 Jac. I., c. 16, viz., "that after twenty years' possession of the mortgagee he should not be disturbed."[1] Where, however, the mortgagor was prevented from asserting his claim by reason of certain impediments, mentioned as exceptions in the stat. 21 Jac. I., c. 16, viz., imprisonment, infancy, coverture, &c., in all such cases, by analogy to the statute, equity allowed ten years after the removal of the impediment.[2] Any slight acknowledgment by the mortgagee of the existence of the equity of redemption would take the case out of the statute.[3]

Statute of Limitations. Old law.

The law on this subject is at present regulated by the stat. 3 & 4 Will. IV., c. 27, s. 28, by which it is enacted, that whenever a mortgagee has obtained possession of the land comprised in his mortgage, the mortgagor shall not bring a suit to redeem the mortgage but within twenty years next after the time when the mortgagee obtained possession, or next after any written acknowledgment of the title of the mortgagor, or of his right to redemption shall have been given to him or his agent, signed by the mortgagee.[4]

Present law. 3 & 4 Will. IV., c. 27, s. 28.

With whatever strictness the common law may have originally regarded the breach of the condition by the mortgagor, yet in modern times the doctrine of the court of equity recognising the mortgagor until foreclosure to be the actual owner of the land, has been to some extent imported into the common law by the legislature. By stat. 15 & 16 Vict., c. 76, ss. 219, 220, if the mortgagor being in possession, an ejectment is brought by the mortgagee, provided no suit is pending

Of the estate of the mortgagor.

15 & 16 Vict., c. 76.

[1] *Anon.* 3 Atk. 313.
[2] *Beckford* v. *Wade*, 17 Ves. 99.
[3] *Smart* v. *Hunt*, 4 Ves. 478, *n.*
[4] *Batchelor* v. *Middleton*, 6 Hare, 75; *Lucas* v. *Denison*, 13 Sim. 584; *Stansfield* v. *Hobson*, 16 Beav. 236; *Thompson* v. *Bowyer*, 11 W. R. 975.

in any court of equity for redemption or foreclosure, the payment of principal, interest, and costs will, except in certain cases, be deemed a satisfaction of the mortgage.

Mortgagor in possession not accountable for rents and profits.

A very considerable privilege annexed to the estate of the mortgagor while he is in possession is, that he is not bound to account for the rents and profits while in possession, even although the security should prove insufficient.[1]

Restrained from waste if security be insufficient.

Although in equity the mortgagor remains the actual owner of the land until foreclosure, entitling him while in possession to the receipt of the rents and profits without an account, yet equity, regarding the land, with all its produce, as a security for the mortgage debt, will restrict the right of ownership within those bounds which may not operate to the detriment or injury of the mortgagee. Hence equity will grant an injunction on a bill filed by the mortgagee, against waste as the felling of timber by the mortgagor; but in order to grant the injunction, the court must first be satisfied that the security is insufficient.[2] Equity also will, in no instance, it seems, interpose its authority to obstruct the mortgagee from evicting the mortgagor from the possession, but for such purpose will consider the latter a mere tenant at will.[3] It follows from the mortgagor being only a tenant at will, or at sufferance, that he cannot make a lease to bind the mortgagee, and if he make such a lease, the mortgagee may proceed to eject the lessee without notice.[4]

Mortgagor tenant at will to mortgagee. Mortgagor cannot make leases binding on mortgagee.

Mortgagee entitled to possession.

The mortgagee, by virtue of his mortgage, becomes the legal owner of the land, and consequently entitled

[1] *Ex parte Wilson*, 2 Ves. & Bea. 252.

[2] *Farrant* v. *Lovell*, 3 Atk. 723; *King* v. *Smith*, 2 Hare, 239; *Russ* v. *Mills*, 7 Gr. 145.

[3] *Cholmondeley* v. *Clinton*, 2 Mer. 359.

[4] *Keech* v. *Hall*, Doug. 22.

at law to immediate possession, or to the receipt of the rent, if the land be in lease.[1]

The mortgagee is entitled, out of the profits, to repay himself all the necessary expenses attending the collection of the rents,[2] and he may stipulate with the mortgagor for the appointment of a receiver to be paid by the latter.[3] But courts of equity, fearful of opening a door to fraud, have imposed a restriction on the mortgagee that he shall not be permitted to make any charge on the estate for his personal trouble,[4] nor appoint himself a receiver of the estate, although under an express agreement with the mortgagor for that purpose,[5] for he is entitled to no benefit beyond his principal, interest, and costs.

Mortgagee shall not charge for personal trouble.

With regard to the question as to what extent the mortgagee of West India estates may charge commission, the result of the different cases appears to be, that whilst he is mortgagee out of possession, he may stipulate for the consignment of the produce, and charge commission on the net produce as a compensation for his trouble.[6] But when he is in possession, he stands in precisely the same situation as a mortgagee in possession in England; and consequently, if he chooses to be consignee himself he has no commission.[7]

West India estates.

A stipulation that the mortgagee shall receive interest at £4 per cent. if regularly paid, but £5 per cent. if default is made, is good if £5 per cent. be reserved by the deed. But if £4 per cent. only is reserved, a stipulation that £5 per cent. shall be paid, if the in-

Stipulation for lower rate of interest on punctual payment.

[1] Coote, 339.
[2] *Godfrey* v. *Watson*, 3 Atk. 518.
[3] *Davis* v. *Dendy*, 3 Mad. 170.
[4] *Godfrey* v. *Watson*, 3 Atk. 518.
[5] *French* v. *Baron*, 2 Atk. 120.
[6] *Faulkner* v. *Daniel*, 3 Hare, 218.
[7] *Leith* v. *Irvine*, 1 My. & K. 277; Coote, 343.

terest be not regularly paid, is in the nature of a penalty, against which the court will relieve.[1]

Mortgagee must keep estate in necessary repair with surplus rents.

It is the duty of the mortgagee in possession to keep the premises in necessary repair. He will be entitled to all his expenses attending the renewal of leases, or in maintaining the title.[2] But a mortgagee is not bound to lay out money on the estate, except for necessary repairs, and that only to the amount of the surplus rents,[3] nor can he, on the other hand, compel the mortgagor to advance money for the renewal of the leases without an express agreement between them to that effect.[4]

Mortgagee in possession must account.

Even though he has assigned the mortgage.

When the mortgagee is in possession, he is considered in equity, in some measure, in the light of a trustee, and is accountable for the rents and profits of the land; and therefore, if without the assent of the mortgagor he assigns over the mortgage to another, he will be held liable to account for the profits received *subsequently* to the assignment, on the principle that having turned the mortgagor out of possession, it is incumbent on him to take care in whose hands he places the estate.[5]

Mortgagee is accountable for what he actually receives, or what but for his wilful default he might have received.

But though he is liable to an account, he is not obliged to account, according to the actual value of the land, nor bound by any proof that the land is worth so much, unless it can be proved that he made so much of it, or might have done so without his own wilful default, as if he turned out a sufficient tenant who held it at so much rent, or refused to accept a tenant who would have given so much for it;[6] because it is the laches of the mortgagor, that he lets the land lapse into the hand of the mortgagee by the

[1] 2 Sp. 631.
[2] *Manlove* v. *Bale*, 2 Vernon, 84; *Godfrey* v. *Watson*, 3 Atk. 518.
[3] Coote, 344.
[4] *Manlove* v. *Bale*, 2 Vern. 84.
[5] Coote, 303.
[6] Coote, 345; *Anon.* 1 Vern. 45.

non-payment of the money; therefore, except as above-mentioned, when the mortgagee enters, he is only accountable for what he actually receives, and is not bound to take the trouble of making the most of another's property.[1] The mortgagee, without payment of principal, interest, and costs, cannot be compelled by the mortgagor or his assigns to produce the title deeds, even though their production is required for the purpose of enabling the mortgagor to negotiate a loan, and so to pay off the mortgagee.[2]

Mortgagee until payment cannot be compelled to produce his title deeds.

It seems that a mortgagee cannot accept a valid lease from the mortgagor, even it appears, though free from circumstances of fraud, and at a fair rent; the reason being thus stated—"The mortgagor is under the control of the mortgagee in the very subject-matter of the contract, and if the mortgagee had distinctly said to the mortgagor, 'You must let to me a lease for ninety-nine years, at the rent which I think fit to give, and if you will not, I will harass you by all the means by which a mortgagee can harass a debtor;' it is plain a lease so obtained could not stand. If the same thing can be done without a word spoken, the same consequences ought to follow. Ought evidence of such a conversation to be required? Is it not better to hold, as in the case of a trustee, 'because this may be done, it shall be taken as done, and the act, if disputed, shall be invalid.'"[3]

Mortgagee cannot take a valid lease from mortgagor.

A further considerable disability annexed to the mortgagee's estate is, that although he is at law the actual owner, and consequently can make a good legal title, yet he cannot in equity make a valid or binding

Mortgagee cannot in equity make a binding lease.

[1] Coote, 345.
[2] *Damer* v. *Lord Portarlington*, 15 Sim. 380.
[3] *Webb* v. *Rorke*, 2 Sch. & Lef. 661; Coote, 364.

lease, unless, it seems, it is of necessity, and to avoid a probable loss.[1]

Renewed leaseholds.

Advowson.

Equity holds that if leaseholds be in mortgage, and the mortgagee renew, he will take the renewed lease subject to the like equity, as was subsisting in the old lease,[2] and if an advowson be in mortgage, and the living become vacant, the mortgagor, and not the mortgagee shall present;[3] nor will equity permit the mortgagor to agree to the contrary, for the mortgagee shall have no benefit beyond his principal, interest, and costs.

Mortgagee cannot fell timber.

Unless security be insufficient.

A further restriction on the estate of the mortgagee in possession, is that he shall not be permitted to waste the estate.[4] If he proceed to fell timber, an account will be decreed, and the produce applied, first, in payment of the interest, and then, in sinking the principal, and equity will grant an injunction against him, unless the security prove defective, in which case the court will not restrain him from felling timber, the produce being of course applied in ease of the estate.[5] So, if he unnecessarily pulls down buildings and erects new buildings without the consent of the mortgagor, he is liable for any loss of rent which is thereby occasioned.[6]

The doctrine of tacking.

Both at law and in equity, in the absence of particular circumstances, statutes, judgments, and recognisances, all rank according to their date,[7] and so, in equity, do equitable charges of every kind, where the equities are equal in all other respects than that of priority of time.[8]

[1] *Hungerford* v. *Clay*, 9 Mod. 1.
[2] *Holt* v. *Holt*, 1 Ch. Ca. 190.
[3] *Mackenzie* v. *Robinson*, 3 Atk. 559.
[4] *Hanson* v. *Derby*, 2 Vern. 392.
[5] *Witherington* v. *Bankes*, Selw. Ch. Ca. 30.
[6] *Sandon* v. *Hooper*, 6 Beav. 246; 14 L. J. Ch. N. S. 120.
[7] 2 Sp. 727.
[8] *Rice* v. *Rice*, 2 Drew. 78.

With reference to the rights of mesne, or intermediate incumbrancers, the doctrine of tacking has been thus stated. "*In aequali jure, melior est conditio possidentis.* Where equity is equal, the law shall prevail; and he that hath only a title in equity, shall not prevail against law and equity. As a purchaser or mortgagee coming in upon a valuable consideration without notice, and purchasing in a precedent incumbrance, it shall protect his estate against any person that hath a mortgage subsequent to the first, and before the last mortgage, though he purchased in the first incumbrance, after he had notice of the second mortgage; for he hath both law and equity."[1] In considering this rule of equity, Lord Hardwicke has remarked,[2] that it could not happen in any other country but this, because the jurisdiction of law and equity is administered here in different courts, and creates different kinds of rights in estates; and therefore, as courts of equity break in upon the common law, where necessity and conscience require it, still they allow superior force and strength to a legal title to estates; and therefore, where there is a legal title and equity on one side, the Court of Chancery never thought fit that by reason of a prior equity against a man who has a legal title, that man shall be hurt, and this, by reason of the force which the court necessarily and rightly allows to the common law, and to legal titles; but if this had happened in any other country, it could never have been made a question; for if the law and equity are administered by the same jurisdiction, the rule, *qui prior est tempore, potior est jure*, must hold.[3]

In aequali jure, melior est conditio possidentis.

Doctrine of tacking arises from the existence of two jurisdictions.

The leading principles of this doctrine are fully stated in the case of *Brace* v. *Duchess of Marlborough.*[4]

[1] 2 Fonblanque on Eq. 302, 5th ed.

[2] *Wortley* v. *Birkhead*, 2 Ves. Sr. 574.

[3] *Rooper* v. *Harrison*, 2 K. & J. 108, 109.

[4] 2 P. W. 491.

1. Third mortgagee buying in first mortgage, with notice of second, may tack.

1. "That if a third mortgagee buys in the first mortgage, though it be *pendente lite*, pending a bill brought by the second mortgagee to redeem the first, yet the third mortgagee having obtained the first mortgage, and got the law on his side, and equal equity, he shall squeeze out the second mortgagee, and this, the Lord Chief Justice Hale called a 'plank' gained by the third mortgagee, or *tabula in naufragio*, which construction is in favour of a purchaser, every mortgagee being such *pro tanto*."

Third mortgagee must have taken his own mortgage without notice of the second.

In this case, it must carefully be noted that although the third mortgagee get in the first mortgage, *pendente lite*, i.e., *with notice*, he shall, nevertheless, be allowed to tack. The principle on which the doctrine is founded is thus explained:[1]—"The rule of equity requires no more than that the third mortgagee should not have had notice of the second at the time of lending the money; for it is by lending the money without notice that he becomes an honest creditor, and acquires the right to protect his debt. But he is not compelled to look for this protection till his debt is in danger of being prejudiced; and, therefore, when that danger is discovered to him, whether it be by suit in equity, or by any extra-judicial means, as the honesty of his debt is not affected by the discovery, so the right of protecting that debt, and the efficacy of such protection, are not prejudiced; hence arose the rule which permitted the subsequent incumbrancers to purchase *pendente lite*."[2] Although if the legal estate be outstanding in a third person who has no privity with the several incumbrancers, the party obtaining it would have priority,[3] yet where the legal owner is trustee for all, he cannot create a priority by transferring the estate to any one. Thus, if an owner having the legal

And may therefore protect his honest debt.

By transfer of legal estate, if outstanding in person having no privity with prior incumbrancers.

[1] 1 Eden. 530.

[2] *Marsh* v. *Lee*, 1 L. C. 550; *Morris* v. *Paske*, 2 Atk. 52; *Wilmot* v. *Pike*, 5 Hare, 14.

[3] *Carter* v. *Carter*, 3 K. & J. 617; *Bates* v. *Johnson*, Johns. 304.

estate, create a charge in favour of A., then a second charge in favour of B., and then a third in favour of C., he cannot alter the equities by transferring the legal estate to any of them.[1]

2. That if a judgment-creditor, &c., buys in the first mortgage, he shall not tack or unite the mortgage to his judgment, and thereby gain a preference; for such judgment-creditor cannot be called a purchaser, nor has he any right to the land; he has neither *jus in re*, nor *jus ad rem*. All that he has by his judgment is a lien[2] on the land, but *non constat*, whether he will ever make use of it, for he may take his debt out of the goods of his debtor by *fieri facias*, or he may take his body, after which, during the defendant's life, he can have no other execution; besides which, the judgment-creditor does not lend his money on the immediate view, or contemplation of the land, nor is he deceived or defrauded, though his debtor had before made twenty mortgages of his estate; but a mortgagee is defrauded or deceived if the mortgagor has already mortgaged his land to another."[3]

2. Judgment creditor buying in the first mortgage shall not tack. Judgment-creditor not a purchaser.

He did not lend his money in contemplation of the land.

It would seem from the principles laid down in the judgment in *Whitworth* v. *Gaugain*,[4] that the law in this respect has not been altered either by the 1 & 2 Vict., c. 110, or by 27 & 28 Vict., c. 112; for if the effect of the judgment is only to charge the interest which the debtor has remaining in him, the creditor can have no right, by means of tacking, to cut off an incumbrance which preceded his judgment.[5]

Law unaltered by 1 & 2 Vict., c. 110, & 27 & 28 Vict., c. 112. Judgment can only effect what the debtor had to part with.

3. That if a first mortgagee lends a further sum to the mortgagor upon a statute or judgment, he shall

3. First mortgagee lending a further sum

[1] *Adams* v. *Sharples*, 11 W. R. 450; 32 Beav. 213.
[2] See 27 & 28 Vict., c. 112.
[3] *Lacey* v. *Ingle*, 2 Ph. 413; *Spencer* v. *Pearson*, 24 Beav. 266.
[4] 3 Hare, 416.
[5] Coote, 409; *Kinderley* v. *Jervis*, 22 Beav. 1; *Beavan* v. *Lord Oxford*, 6 De G. M. & G. 507.

on a judgment may tack against a mesne mortgagee.

retain against a mesne mortgagee, until both his securities are satisfied; and *à fortiori* if the first mortgagee lends on a mortgage.[1]

But first mortgagee must have the legal estate or the better right to call for it.

This rule results from the doctrine already noticed, that where equity is equal, the law shall prevail. But this principle will not apply unless the first mortgagee *has the legal estate or the better right to call for it;* for otherwise the incumbrancers, whether by mortgage or judgment, will be payable according to the priority of their respective incumbrances; nor will the rule apply if the mortgagee had notice of the mesne incumbrance, at the time of making the further advance.[2]

And must make the advance without notice.

First mortgagee must not have notice of the mesne incumbrance.

And it has further been decided that although the first mortgage was made to secure a sum and *further advances*, if the first mortgagee make a further advance with notice of a mesne incumbrance, he will not be entitled to priority in respect of such further advance.[3]

4. Where legal estate is outstanding, incumbrancers rank according to time.

4. When a puisne mortgagee has bought in a prior incumbrance, but the legal estate is vested in a trustee, or the puisne mortgagee has not obtained the legal title, or he takes *en autre droit*,[4] the court clearly holds that the puisne mortgagee can make no advantage of his prior incumbrance, because in all cases where the legal estate is outstanding, the several incumbrances must be paid according to their priorities in point of time, *qui prior est tempore potior est jure.*

Unless one of the incumbrancers has a better title to call for the legal estate.

But if any one of the incumbrancers has a better title to call for an assignment or conveyance of the legal estate, as, for instance, when a declaration of trust of the legal estate has been made in his favour,

[1] *Wyllie* v. *Pollen*, 11 W. R. 1081.
[2] Coote on Mortgages, 409.
[3] *Shaw* v. *Neale*, 20 Beav. 157; *Rolt* v. *Hopkinson*, 9 H. L. Cas. 514.
[4] *Morret* v. *Paske*, 2 Atk. 52.

he will be placed in equity, in the same situation as if he had obtained an actual assignment.[1]

When a bond debt may be tacked.

How far a *bond debt* might be tacked to a mortgage was for a long time a matter of doubt. But the point appears to be now settled. A prior mortgagee having a bond debt, whether prior or subsequent to his mortgage,[2] cannot tack it against any intervening incumbrancer by mortgage or judgment, or even against an intervening bond creditor,[3] or even against the mortgagor himself,[4] or as against a purchaser of the equity of redemption; but only as against the heir,[5] or as against the beneficial devisee;[6] and this for the sole purpose of preventing circuity of action.[7] And since 3 & 4 Will., c. 104, it seems a simple contract debt may be tacked against the heir or devisee where there is not a devise for payment of debts.[8]

Simple contract debt.

Priority may be lost by fraud.

The right of priority may be lost by fraud. "If a man by the suppression of the truth which he was bound to communicate, or by the suggestion of a falsehood, be the cause of prejudice to another who had a right to a full and correct representation of the fact, it is certainly agreeable to the dictates of good conscience, that his claim should be postponed to that of the person whose confidence was induced by his representation."[9]

A mortgagee denying his mortgage, so as to mislead an intending mortgagee.

If A., being about to lend money to B., informs C. of his intention, and asks C. whether he has any incumbrance on B.'s estate, and C. denies that he has any, whereby A. is induced to lend his money to B., and it proves that C. had at the time an existing

[1] *Pomfret* v. *Windsor*, 2 Ves. 487; *Allen* v. *Knight*, 5 Hare, 272; *Wilmot* v. *Pike*, 5 Hare, 14; *Cooke* v. *Wilton*, 29 Beav. 100.

[2] *Windham* v. *Jennings*, 2 Ch. Rep. 247.

[3] *Lowthian* v. *Hasel*, 3 Bro. C. C. 162.

[4] *Jones* v. *Smith*, 2 Ves. J. 376.

[5] *Shuttleworth* v. *Laycock*, 1 Vern. 245.

[6] *Challis* v. *Casborne*, 1 Eq. Ca. Ab. 325; *Du Vigier* v. *Lee*, 2 Hare, 326.

[7] *Heams* v. *Bance*, 3 Atk. 630; Coote, 391-393.

[8] Coote, 402; Sp. 723-725, 735.

[9] 1 Fonblanque on Eq. 64.

mortgage or judgment on B.'s estate, this is a fraud on the part of C., and his security shall be postponed to that of A. But to fix C. with the fraud it is necessary that he should be informed of A.'s intention to lend the money; for otherwise, the fraudulent intention is wanting on which the relief is to proceed, and the mere falsehood is not sufficient for such purpose.[1]

Consolidation of mortgages. Mortgagor must redeem *all* the mortgages which the mortgagee holds on his property.

As a general rule, both in suits for foreclosure as well as redemption, the mortgagor cannot redeem one mortgage without redeeming all other mortgages which the mortgagee holds upon any part of his property, which he has a right to consolidate or tack together."[2] And this rule is applicable as well to mortgages of realty[3] as to equitable mortgages of personalty by way of trusts for sale;[4] and has been extended to the purchaser for value of the equity of redemption, without notice of other mortgages.[5]

Special remedies of mortgagee. Foreclosure.

Equity having determined that the mortgaged debt shall be considered the principal, and the land a pledge, and as a consequence that the mortgagor, notwithstanding his breach of condition and the consequent forfeiture at law of his estate, shall be relievable in equity on payment of principal, interest, and costs, and that the mortgagee in possession was accountable for the rents and profits; it became, on the other hand, just, that the mortgagee should not be subject to a perpetual account, nor converted into a perpetual bailiff, but that after a fair and reasonable time given to the mortgagor to discharge the debt, he should lose his equity, or, in other words, be foreclosed his right of redemption.

An intermediate mortgagee is entitled to file a bill of foreclosure against the mortgagor and subsequent

[1] Coote, 415.

[2] *Selby* v. *Pomfret*, 1 J. & H. 336; 9 W. R. 583; *Phillips* v. *Gutteridge*, 4 De G. & Jo. 531; *Tassel* v. *Smith*, 2 De G. & Jo. 713-718.

[3] *Neve* v. *Pennell*, 11 W. R. 986.

[4] *Watts* v. *Symes*, 1 De G. M. & G. 240; *Tweedale* v. *Tweedale*, 23 Beav. 341.

[5] *Peevor* v. *Luck*, L. R. 4 Eq. 537.

mortgagees.[1] A foreclosure suit cannot be brought but within twenty years next after the right to bring such suit first accrued, or within twenty years after the last payment of any part of the principal money or interest.[2] Statute of limitations.

Before the stat. 15 & 16 Vict., c. 86, s. 48, courts of equity, except in a few cases,[3] refused to decree a sale against the will of the mortgagor; but by that act the Court of Chancery may direct a sale of mortgaged property instead of a foreclosure, on such terms as it may think fit. Sale by court, 15 & 16 Vict., c. 86.

A power of sale, even before that act, was usually inserted in mortgage-deeds, giving the mortgagee authority to sell the premises; but such a power was only permitted where the mortgaged land did not exceed in value the money lent; for if the security were very ample, it was not likely that the mortgagor would consent to such a power being given to the mortgagee, in case default should be made in payment; and the concurrence of the mortgagor in the sale is not necessary to perfect the title of the purchaser.[4] The mortgagee having sold, is at liberty to retain to himself principal, interest, and costs; and having done this, the surplus, if any, must be paid over to the mortgagor.[5] And now, by stat. 23 & 24 Vict., c. 145, s. 11, a power of sale, a power to insure against fire, and a power to require the appointment of a receiver, have been rendered incident to every mortgage or Power of sale in the mortgage-deed. Powers under 23 & 24 Vict., c. 145.

[1] 2 Sp. 674.

[2] 3 & 4 Will. IV., c. 27, ss. 24, 28; 7 & 8 Will. IV. & 1 Vict., c. 28; Coote, 449.

[3] Coote, 493, 494.

[4] *Corder* v. *Morgan*, 18 Ves. 344; *Newman* v. *Selfe*, 33 Beav. 522.

[5] Where the surplus produce on the execution of a power of sale on a mortgage in fee is directed to be paid to the mortgagor, his executors, &c., this is not of itself a conversion of the equity of redemption into personal estate. If the sale takes place in the lifetime of the mortgagor, the surplus is personal estate, but if he die before the sale is made, the equity of redemption descends to the heir, and he is entitled to the surplus (*Wright* v. *Rose*, 2 Sim. & Stu. 323; 2 Sp. 366).

charge by deed affecting any hereditaments of any nature. These powers, however, are not to arise until after one year from the time when the principal money shall have become payable, according to the terms of the deed, or after any interest on such principal money shall have been in arrear for six months, or after any omission to pay any premium on any insurance which by the terms of the deed ought to be paid by the person entitled to the mortgaged property. And no sale is to be made until after six months notice in writing.[1] But none of these powers are to be exercised if it be declared in the mortgage-deed that they shall not take effect.[2]

Mortgagee may pursue all his remedies concurrently.

If a debt be secured by the mortgage of real estate, and also by covenant, and collaterally by bond, the mortgagee may pursue all his remedies at the same time.[3] If he obtain full payment on the bond or covenant, the mortgagor is by the fact of payment entitled to redeem the estate, and foreclosure is prevented or not allowed. But if the mortgagee obtains only part payment on the bond or covenant, he may go on with his foreclosure suit, and giving credit in account for what he has received on the bond or covenant, he may foreclose for nonpayment of the remainder. On the other hand, if he obtains a foreclosure first, and alleges that the value of the estate is not sufficient to satisfy the debt, he is not absolutely precluded from suing on the bond or covenant; but it is held that by doing so he gives to the mortgagor a renewed right to redeem, or, in other words, opens the foreclosure, and consequently upon the commencement of an action against the mortgagor on the bond after foreclosure, he may file a bill for redemption, and upon payment of the whole debt secured by the mortgage, he is entitled to have the estate back again, and the securities given

If mortgagee foreclose first, and then sue on the bond, he opens the foreclosure, and mortgagor may redeem.

[1] Sec. 13.
[2] Sec. 32.
[3] *Lockhart* v. *Hardy*, 9 Beav. 349.

up. After foreclosure, therefore, the court will not restrain the mortgagee from suing on the bond, provided he retains the mortgaged estate in his power, ready to be redeemed in case the mortgagor should think fit to avail himself of the opening of the foreclosure.[1] It follows, therefore, if the mortgagee has so dealt with the mortgaged estate as to be unable to restore it to the mortgagor on full payment, as if he had sold it,[2] the court will prevent his suing at law to receive the mortgage-money.[3]

Mortgagee must therefore have the estate in his power.

There is a class of cases in which the question has been whether it is intended by the parties making the mortgage that the equity of redemption shall be limited in a manner different from the uses subsisting in the estate prior to the mortgage, or shall result to the same uses. These questions have generally arisen in mortgages by husband and wife; and the principle of equity in such cases is, that if money be borrowed by the husband and wife upon the security of the wife's estate, although the equity of redemption is by the mortgage deed reserved to the husband and his heirs, or to the husband and wife and their heirs, yet there shall be a *resulting* trust for the benefit of the wife and her heirs, and that the wife or her heir shall redeem, and not the heir of the husband, her estate being in equity deemed only a security for his debt.[4] But at the same time, the intention to alter the previous title may be manifested by the language of the proviso itself, and there is no necessity for an express declaration or recital to that effect.[5]

The equity of redemption follows the limitations of the original estate.

Mortgage by husband of his wife's estate.

Equity of redemption results to wife.

Unless a different intention manifested.

[1] 2 Sp. 682.
[2] *Lockhart* v. *Hardy*, 9 Beav. 349.
[3] *Palmer* v. *Hendrie*, 27 Beav. 349.
[4] *Huntingdon* v. *Huntingdon*, 2 L. C. 915; *Whitbread* v. *Smith*, 3 De G. M. & G. 727; Coote, 523.
[5] *Atkinson* v. *Smith*, 3 De G. & Jo. 186–192.

CHAPTER XVII.

OF EQUITABLE MORTGAGES OF REALTY BY DEPOSIT OF TITLE-DEEDS.

Statute of Frauds requires contracts concerning lands to be in writing.

THE Statute of Frauds[1] enacts that "no action shall be brought upon any contract, or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised." Notwithstanding this statute, it is now decided[2] that if the title-deeds of an estate are, without even verbal communication, deposited by a debtor in the hands of his creditor, or of some third person on his behalf,[3] such deposit is of itself evidence of an agreement executed, for a mortgage of the estate,[4] of which agreement the creditor may avail himself as of an agreement in writing for that purpose; for he may file his bill for the completion of the security by a legal conveyance from his debtor, who will not be allowed to plead the Statute of Frauds.[5]

Deposit of title-deeds evidence of an agreement for a mortgage.

Origin of the doctrine.

The doctrine of equitable mortgages appears to have arisen from the nature of the case. In *Keys* v. *Williams*,[6] Lord Abinger said,—"The doctrine of equitable mortgages has been said to be an invasion of the Statute of Frauds. . . . But in my opinion that statute was never

[1] 29 Car. II., c. 3, s. 4.
[2] *Russel* v. *Russel*, 1 L. C. 603.
[3] *Ex parte Coming*, 9 Ves. 115.
[4] *Ex parte Wright*, 19 Ves. 258.
[5] *Pryce* v. *Bury*, 2 Drew. 42; *Ferris* v. *Mullins*, 2 Sm. & Giff. 378; *Ex parte Moss*, 3 De G. & Sm. 599.
[6] 3 Y. & C. Exch. Ca. 55, 61.

meant to affect the transaction of a man borrowing money and depositing his title-deeds as a pledge of payment. A court of law could not assist such a party to recover back his title-deeds by an action of trover; the answer to such an action being, that the title-deeds were pledged for a sum of money, and that, till the money is repaid, the party has no right to them. So, if the party came into equity for relief, he would be told that before he sought equity he must do equity, by repaying the money, in consideration for which the deeds had been lodged in the other party's hands."

Deposit of deeds covers further advances.

In *Russel* v. *Russel*[1] it was only decided that the deeds were a security for a sum advanced at the time of the deposit. But this rule has been extended, and it is now held that such a deposit will cover future advances, if such was the agreement when the first advance was made; or if it can be proved that a subsequent advance was made on an agreement, express or implied, that the deeds were to be a security for it.[2]

Deposit of deeds for purpose of preparing a legal mortgage.

Where there has been a deposit of title-deeds for the purposes of preparing a legal mortgage, there has been a great conflict of opinion as to whether that would constitute a good equitable mortgage; but the balance of authority seems to be in favour of the proposition that a delivery of deeds for the purpose of preparing a legal mortgage constitutes, in fact, a valid equitable mortgage.[3]

Parol agreement to deposit deeds for money advanced.

A parol agreement to deposit title-deeds for a sum of money advanced, does not without an actual deposit constitute a good equitable mortgage.[4]

[1] 1 L. C. 603.

[2] *Ex parte Kensington*, 2 V. & B. 83; *Ede* v. *Knowles*, 2 Y. & C. C. C. 172; *James* v. *Rice*, 5 De G. M. & G. 461.

[3] 1 L. C. 609.

[4] *Ex parte Coombe*, 4 Mad. 249; *Ex parte Farley*, 1 M. D. & De G. 683.

All title-deeds need not be deposited.

It is now clearly decided that in order to create an equitable mortgage it is not necessary that all the title-deeds or even all the material title-deeds should be deposited; it is sufficient if the deeds deposited are material evidences of title, and are proved to have been deposited with the intention of creating a mortgage.[1]

Equitable mortgagee parting with the title-deeds to mortgagor.

An equitable mortgagee who parts with the title-deeds, and so enables the depositor to make another equitable mortgage, may be postponed to such second equitable mortgagee by reason of his laches, in not getting back the deed—on the principle that as between two innocent parties, the one must suffer who has permitted the fraud to be committed.[2]

Equitable mortgagee has priority to a subsequent legal mortgagee, with notice.

Legal mortgagee postponed to prior equitable mortgagee, if former has been guilty of fraud or gross negligence.

Not postponed if he has made *bonâ fide* inquiry after the deeds.

An equitable mortgagee by deposit of title-deeds will be entitled to priority over a subsequent legal mortgagee who advanced his money with notice of the deposit.[3] The principles which govern the case on this point are thus summarized by Turner, V.-C., in *Hewitt* v. *Loosemore*,[4] "That a legal mortgagee is not to be postponed to a prior equitable one, upon the ground of his not having got in the title-deeds, unless there be fraud or gross and wilful negligence on his part, that the court will not impute fraud, or gross or wilful negligence to the mortgagee, if he has *bonâ fide* inquired for the deeds, and a reasonable excuse has been given for the non-delivery of them; but that the court will impute fraud, or gross and wilful negligence to the mortgagee, if he omits all inquiry as to the deeds; and I think there is much principle both in the rule and the distinctions upon it. When this court is called upon to postpone a legal mortgagee, its powers are invoked to take away a legal right; and I see no ground which can justify it in doing so, except

[1] *Lacon* v. *Allen*, 3 Drew. 579; *Roberts* v. *Croft*, 24 Beav. 223; 2 De G. & Jo. 1.

[2] *Waldron* v. *Sloper*, 1 Drew. 193.

[3] *Hiern* v. *Mill*, 13 Ves. 114; *Jones* v. *Williams*, 5 W. R. 540.

[4] 9 Hare, 458

fraud, or gross and wilful negligence, which, in the eye of this court, amounts to fraud; and I think that in transactions of sale and mortgage of estates, if there be no inquiry as to the title-deeds which constitute the sole evidence of the title to such property, the court is justified in assuming that the purchaser or mortgagee has abstained from making the inquiry, from a suspicion that his title would be affected if it was made, and is, therefore, bound to impute to him the knowledge which the inquiry, if made, would have imparted. But I think, if a *bonâ fide* inquiry is made, and a reasonable excuse given, there is no ground for imputing the suspicion, or the notice which is consequent upon it."

Gross and wilful negligence tantamount to fraud.

Absence of inquiry after deeds presumptive evidence of fraud.

CHAPTER XVIII.

OF MORTGAGES AND PLEDGES OF PERSONALTY.

Difference between a mortgage and a pledge of personalty.

A MORTGAGE of personal property differs from a pledge. The former is a conditional transfer or conveyance of the property itself; and if the condition is not duly performed, the whole title vests absolutely at law in the mortgagee, exactly as it does in the case of a mortgage of lands. A pledge only passes the possession, or at most, a special property only, to the pledgee, with a right of retainer, until the debt or other engagement is discharged.[1]

Equity of redemption on mortgage of personalty.

In mortgages of personal property, although the prescribed condition has not been fulfilled, there exists, as in mortgages of land, an equity of redemption, which may be asserted by the mortgagor, if he brings his bill to redeem, within a reasonable time.[2] There is, however, a difference between mortgages of land and mortgages of personal property, in regard to the rights of the mortgagee after a breach of the condition. In the latter case, there is no necessity to bring a bill of foreclosure; but the mortgagee, upon due notice, may sell the personal property mortgaged.[3] The reason of this difference seems to be the same in principle with that on which equity, as a general rule, refuses to decree a specific performance of an agreement concerning personal chattels; namely, that other things of the same kind, and of the very same worth, even to

On breach of condition, mortgagee may sell personalty.

A rule of convenience.

[1] St. 1030; *Jones* v. *Smith*, 2 Ves. Jr. 378.

[2] *Kemp* v. *Westbrook*, 1 Ves. 278.

[3] St. 1031.

the owner himself, may be purchased for the sum which the articles in question fetch; and, therefore, if such property is mortgaged, the mortgagee may properly be allowed to sell it, on due notice, without the inconvenience of filing a bill of foreclosure.[1]

In a pledge, pledgor may redeem after time fixed by contract.

In cases of pledges, if a time for the redemption be fixed by the contract, still the pledgor may redeem afterwards, if he applies within a reasonable time. But if no time is fixed for the payment, the pledgor has his whole life to redeem, unless he is called upon to redeem by the pledgee; and in case of the death of the pledgor without such demand, his personal representatives may redeem.[2] Generally speaking, the remedy of the pledgor or his representatives, is at law. But if any special ground is shown, as if an account or discovery is wanted, or there has been an assignment of the pledge, a bill will lie in equity.[3]

Remedy of pledgor, as a general rule, is at law.

Pledgee may bring a bill to foreclose and sell.

Pledgee may sell without a judicial decree.

On the other hand, the pledgee may bring a bill in equity, to foreclose and sell the pledge.[4] It seems, also, that the pledgee may, after the time for redemption has passed, upon due notice given to the pledgor, sell the pledge without a judicial decree of sale.[5]

Tacking applicable to mortgages and pledges of personalty.

The doctrine of tacking is applied to pledges and mortgages of personalty, as against the party making the pledge, more extensively than it is, as against a mortgagor of real estate; the presumption against the mortgagor or pledgor will be, that if the pawnee advance any further sums of money to the pawnor, the pledge is to be held until the subsequent debt or ad-

[1] Smith's Manual, 330.

[2] *Vanderzee* v. *Willis*, 3 Bro. C. C. 21; *Kemp* v. *Westbrook*, 1 Ves. 278.

[3] *Jones* v. *Smith*, 2 Ves. Jr. 372; St. 1032.

[4] *Ex parte Mountfort*, 14 Ves. 606.

[5] *Kemp* v. *Westbrook*, 1 Ves. 278; *Lockwood* v. *Ewer*, 9 Mod. 278; *Pothonier* v. *Dawson*, Holt's N. P. 385; St. 1053.

vance is paid, as well as the original debt; and this, without any distinct proof of any contract for that purpose, such as it is necessary to prove in mortgages of real property.[1]

Judgment and simple contract debts may be tacked.

Thus where a policy on the life of A. had been effected under circumstances, which amounted to an assignment of it by way of mortgage to B., to secure a sum lent by him to A., it was held that B. might tack, and retain the proceeds of the policy in satisfaction of, a subsequent judgment debt.[2] This decision has recently been followed in the case of subsequent debts by simple contract.[3]

[1] *Demainbray* v. *Metcalfe*, 2 Vern. 691; Sp. 772; St. 1034.

[2] *Spalding* v. *Thompson*, 26 Beav. 637.

[3] *In re Haselfoot's Estate*, L. R. 13 Eq. 327.

CHAPTER XIX.

OF LIENS.

A LIEN is not in strictness either a *jus in re* or a *jus ad rem;* but it is simply a right to possess and retain property until some charge attaching to it is paid or discharged. It generally exists in favour of artisans and others, who have bestowed labour and services upon the property, in its repair, improvement, and preservation. It has also an existence, in many other cases, by the usages of trade; and in maritime transactions, as in the cases of salvage and general average. It is often created and sustained in equity where it is unknown at law; as in cases of the sale of lands, where a lien exists for unpaid purchase-money. It is not confined to cases of mere labour and services on the very property, or connected therewith; but it often is, by the usage of trade, extended to cases of a general balance of accounts, in favour of factors and others. Now it is obvious that most of these cases must give rise to matters of account; and as no suit is maintainable at law for the property of the owner until the lien is discharged, and as the nature and amount of the lien often are involved in great uncertainty, a resort to a court of equity to ascertain and adjust the account seems in many cases absolutely indispensable for the purposes of justice.[1]

Definition of lien.

Equitable lien.

An instance of a lien originating in custom, and afterwards sanctioned by decisions at law and in equity, is that which a solicitor has on the deeds, books, and papers of his client for his costs. The lien is a right not depending upon contract; it wants the character of

The lien of a solicitor on deeds, books, &c.

[1] St. 506.

a mortgage or pledge; it is merely an equitable right to withhold from his client such things as have been intrusted to him as a solicitor, and with reference to which he has given his skill and labour, and not a right to enforce any active claim against his client.[1]

On fund realised in a suit.

A solicitor has also a lien upon a fund realised in a suit, as to so much as may belong to his own client, for his costs of the suit, or immediately connected with it; and this is a lien which he may actively enforce.[2] Now by 23 and 24 Vict., c. 127, s. 28, it is enacted that it shall be lawful for the court or judge before whom any suit or matter has been heard, to declare that the solicitor employed therein is entitled to a charge upon the property recovered or preserved by his instrumentality in such suit or matter.

Lien only commensurate with client's right at the time of the deposit.

It is quite settled that the right of lien exists only as against the client and the representatives of the client;[3] but it is only commensurate with the right which the client had at the time of the deposit,[4] and is subject to the rights of third persons as against him, so that a prior encumbrancer cannot be affected by it; and when a mortgage is paid off, the solicitor of the mortgagee cannot retain the deeds.[5]

Set off.

But the lien of a solicitor on a sum due or payable to a client prevents a set off against a sum due from his client.[6]

Quasi-liens.

Rights in equity equivalent to liens may arise under

[1] *Bozon* v. *Bolland*, 4 My. & Cr. 358.
[2] 2 Sp. 802; Smith's Man. 333. *Verity* v. *Wylde*, 4 Drew. 427; *Haymes* v. *Cooper*, 33 Beav. 431; *Shaw* v. *Neale*, 6 W. R. 635.
[3] *Blunden* v. *Desart*, 2 Dr. & Warr. 405.
[4] *Young* v. *English*, 7 Beav. 10.
[5] 2 Sp. 800, 801; *Francis* v. *Francis*, 5 De G. M. &. G. 108; *Turner* v. *Letts*, 7 De G. M. & G. 243.
[6] *Ex parte Cleland*, L. R. 2 Ch. 808; *Ex parte Smith*, L. R. 3 Ch. 125.

various circumstances. Thus real or personal estate may be charged by an agreement express or implied, creating a trust, which equity will enforce, both against the person creating the lien, and against others claiming, as volunteers, or with notice, under him. Under this head will fall the cases of legacies and portions charged on land.

As where a charge in the nature of a trust.

It has been held that where a man agrees to sell his estate, and to lend money to the purchaser for improving the estate, he, still having the legal estate, will have a lien for the advances so made, as well as for the purchase-money.[1]

Vendor's lien for advances for improvements.

But it seems that where two or more purchase an estate, and one pays the money, and the estate is conveyed to them both, the one who pays the money gains neither a lien nor a mortgage, because there is no contract for either; the only remedy he has is to file a bill for contribution.[2]

No lien where two purchase and one pays the money.

If one of two joint-tenants of a lease renew for the benefit of both, he will have a lien on the moiety of the other joint-tenant for a moiety of the fines and expenses.[3]

Joint-tenant's lien for costs of renewing lease.

[1] *Ex parte Linden*, 1 Mont D. & D. 435; 2 Sp. 803.
[2] 2 Sp. 803.
[3] *Ex parte Grace*, 1 B. & P. 376.

CHAPTER XX.

PENALTIES AND FORFEITURES.

Doctrine.

THE doctrine of equity with regard to penalties and forfeitures may be stated in the following words—Wherever a penalty or a forfeiture is inserted, merely to secure the performance of some act, or the enjoyment of some right or benefit, equity regards the performance of such act, or the enjoyment of such right or benefit, as the substantial and principal intent of the instrument, and the penalty or forfeiture, as only accessary, and will therefore relieve against the penalty or forfeiture by simply decreeing a compensation in lieu of the same, proportionate to the damage really sustained.[1]

Penalty, &c., deemed accessary.

Compensation decreed.

Can compensation be made?

If it can, equity relieves.

In all these cases, the general test by which to ascertain whether relief can or cannot be had in equity, is to consider whether compensation can or cannot be made. If compensation can be made, then if the penalty is to secure the mere payment of money, courts of equity will relieve the party upon his paying the principal and interest.[2] If it is to secure the performance of some collateral act or undertaking, the court will ascertain the amount of damages and grant relief on payment thereof.[3]

Party cannot avoid the contract by paying the penalty.

Although equity will generally relieve against a penalty, where it is only intended to secure the performance of a contract; on the other hand, it will not

[1] *Sloman* v. *Walter*, 2 L. C. 991; St. 1314-1320.

[2] *Elliott* v. *Turner*, 13 Sim. 477.

[3] St. 1314; Daniell's Ch. Pr. 1510-1512.

permit the party bound by the agreement to avoid that agreement by paying the stipulated penalty. "The general rule of equity," observes Lord St Leonards, in *French* v. *Macale*,[1] "is, that if a thing be agreed upon to be done, though there is a penalty annexed to its performance, yet the very thing itself must be done."[2]

Where covenantor may do either of two things, paying higher for one alternative than the other, it is not a penalty.

Where, however, upon the construction of the contract, the real intent of the contract is that a covenantor should have either of two alternative covenants at his option; that if he elects to perform one of those alternatives, he is to pay a certain sum of money, but that, if he chooses to perform the other alternative, he is to pay an additional sum of money, in such a case, equity will look upon the additional payment, not as a penalty, but as liquidated damages fixed on by the parties, and will neither relieve the covenantor from payment of the additional sum agreed upon, on doing such latter alternative act; nor, on the other hand, will it compel him to abstain from performing whichever alternative he may choose. This distinction is taken by Lord St Leonards, in the case of *French* v. *Macale*,[3] where he lays down the law as follows:—"If a man covenant to abstain from doing a certain act, and agree that if he do it, he will pay a sum of money, it would seem that he will be compelled to abstain from doing that act; and just as in the converse case, he cannot elect to break his engagement by paying for his violation of the contract. . . . . The question for the court to ascertain is, whether the party is restricted by covenant from doing the particular act, although if he do it, a payment is reserved; or whether, according to the true construction of the contract, its meaning is, that the one party shall have a right to do the act, on payment of what is agreed upon as an equiva-

French *v.* Macale.

[1] 2 Drew. & War. 274.
[2] *Howard* v. *Hopkyns*, 2 Atk. 370.
[3] *Ubi supra.*

lent. If a man let meadow-land for two guineas an acre, and the contract is, that if the tenant choose to employ it in tillage, he may do so, paying an additional rent of two guineas an acre, no doubt this is a perfectly good and unobjectional contract; the breaking-up the land is not inconsistent with the contract which provides that in case the act is done, the landlord is to receive an increased rent." Lord Rosslyn said of such a case as this,[1] "that it was the demise of land to a lessee, to do with it as he thought proper; but if he used it in one way, he was to pay one rent, and if in another, another; that is a different case from an agreement not to do a thing, with a penalty for doing it."[2]

Rules as to distinction between a penalty and liquidated damages.

Having premised the above general remarks, it is proposed to lay down a few rules which may aid the student in arriving at a solution of the question, whether a sum mentioned in an agreement to be paid for a breach, is to be treated as a penalty, or as liquidated and ascertained damages:—

1. Smaller sum secured by larger.

1. Where the payment of a smaller sum is secured by a larger, the sum agreed for must always be considered as a penalty.[3]

2. Covenant to do several things, and one sum for breach of *any* or *all*.

2. Where a deed contains covenants, or an agreement contains provisions for the performance of several acts, and then a sum is stated at the end to be paid upon the breach of any or of all such stipulations, and that sum will be in some instances too large, and in others too small a compensation for the injury thereby occasioned, that sum is to be considered as a penalty.

Kemble v. *Farren.*

Thus, in *Kemble* v. *Farren*,[4] the defendant had engaged

[1] *Hardy* v. *Martin*, 1 Cox, 27.
[2] *Herbert* v. *Salisbury & Yeovil Railway Company*, L. R. 2 Eq. 221.
[3] *Astley* v. *Weldon*, 2 B. & P. 350-354; *Aylet* v. *Dodd*, 2 Atk. 239.
[4] 6 Bing. 141.

to act as principal comedian at Covent Garden for four seasons, conforming in all things to the rules of the theatre. The plaintiff was to pay the defendant £3, 6s. 8d. every night the theatre was open, with other terms. The agreement contained a clause, that if either of the parties should neglect or refuse to fulfil the said agreement, or any part thereof, or any stipulation therein contained, such party should pay to the other the sum of £1000, to which sum it was thereby agreed that the damages sustained by such omission should amount, and which sum was thereby declared by the parties *to be liquidated and ascertained damages, and not a penalty or penal sum or in the nature thereof.* Notwithstanding these sweeping words, the court decided that the sum must be taken to be a penalty, as it was not limited to those breaches which were of an uncertain nature and amount. And Tindal, C. J., said, "that a very large sum should become immediately payable, in consequence of the non-payment of a very small sum, and that the former should not be considered a penalty, appears to be a contradiction in terms."[1]

3. Where amount of injury cannot be measured.

3. On the other hand, if there be a contract consisting of one or more stipulations, the damages from the breach of which cannot be measured, then the contract must be taken to have meant that the sum agreed on was to be liquidated damages, and not a penalty.[2]

4. If only one event on which money is to be payable, and no means of ascertaining damage.

4. There never was any doubt that if there be only one event upon which the money is to become payable, and there is no adequate means of ascertaining the precise damage that may result to the plaintiff from the breach of the contract, it is perfectly competent to

[1] Mayne. on Dam. 67; *Davies* v. *Penton*, 6 B. & C. 223; *Horner* v. *Flintoff*, 9 M. & W. 681; 3 Byth. & Jarm. Conv. by Sweet. 325; *Dimech* v. *Corlett*, 12 Moo. P. C. C. 199.

[2] Mayne on Dam. 67; *Atkyns* v. *Kinnier*, 4 Exch. 776-783; *Galsworthy* v. *Strutt*, 1 Exch. 659.

the parties to fix a given amount of compensation in order to avoid the difficulty.[1]

5. The mere use of term "penalty," or "liquidated damages," not conclusive. A question of construction.

5. The mere use of the term "penalty," or "liquidated damages," does not determine the intention of the parties that the sum stipulated should really be what it is said to be; but it is like any other question of construction, to be determined by the nature of the provisions, and the language of the whole instrument.[2]

6. Court leans towards construing sum as a penalty.

6. Where the expressions are doubtful or contradictory, the court, it seems, will lean in favour of the construction which treats the sum named as a penalty only, and not as fixing the measure of the damages, such construction being most consonant with justice.[3] But the mere largeness of the amount fixed will not *per se* be sufficient reason for holding it to be a penalty.[4]

Forfeitures governed by same principles as penalties.

The same general principles which apply to equitable relief against penalties, govern the courts of equity in relieving against forfeitures. Thus, equity will relieve against the forfeiture of a lease for non-payment of rent, on the lessee paying what is due.[5]

Forfeiture from breach of covenant to repair.

It seems not quite settled whether equity will relieve against a forfeiture arising from a breach of covenant to repair; though the general leaning of the court seems to be against granting relief in the absence of special circumstances.[6] Equity will require the covenantee to be satisfied with a substantial performance on the part of the covenantor, where the nature of the covenant

[1] *Sainter* v. *Ferguson*, 7 C. B. 730; *Sparrow* v. *Paris*, 8 Jur. N. S. 391; Byth. & Jarm. Conv. by Sweet. 326; Mayne on Dam. 67.

[2] *Dimech* v. *Corlett*, 12 Moo. P. C. C. 199; *Green* v. *Price*, 13 M. & W. 701; 16 M. &. W. 346; *Jones* v. *Green*, 3 You. & J. 304.

[3] *Davies* v. *Penton*, 6 B. & C. 216.

[4] Per Ld. Eldon, *Astley* v. *Weldon*, 2 B. & P. 351.

[5] Freem. Ch. Rep. 114. The common law courts may now relieve in such a case, 15 & 16 Vict., c. 76, ss. 210-212; 23 & 24 Vict., c. 126, s. 1; *Bowser* v. *Colby*, 1 Hare, 126.

[6] *Hill* v. *Barclay*, 18 Ves. 62.

admits of such performance. But if the contract be such that the court cannot secure its substantial performance, or where it is of the very essence of the contract that it should be strictly performed, equity will not relieve against a forfeiture for non-performance.[1]

Breach of covenant to insure.

The courts of equity could not relieve a tenant from forfeiture for breach of a covenant to insure.[2] "Lord Eldon laid it down that the court would not relieve against breaches of covenant except in cases where payment of money is a complete compensation, and will put the party in the same situation as he would have been if there had been no breach. In this case the landlord could not by any payment of money be put into the situation as he was entitled to be under the covenant." This rule having been found to operate very hardly on lessees who, through inadvertence, neglected to insure, the legislature stepped in and remedied it. Under 22 & 23 Vict., c. 35, s. 4, the court of equity is in certain cases entitled to relieve against a forfeiture for non-insurance.[3] And similar jurisdiction has been conferred upon the courts of common law, by the Common Law Procedure Act of 1860.[4]

22 & 23 Vict., c. 35.

23 & 24 Vict., c. 126.

[1] *Hill* v. *Barclay*, 16 Ves. 402; 18 Ves. 62; *Gregory* v. *Wilson*, 9 Hare, 683; *Nokes* v. *Gibbon*, 3 Drew. 681; *Bamford* v. *Creasy*, 3 Giff. 675; *Croft* v. *Goldsmid*, 24 Beav. 312.

[2] *Green* v. *Bridges*, 4 Sim. 96.

[3] *Page* v. *Bennet*, 2 Giff. 117.

[4] 23 & 24 Vict., c. 126, ss. 2, 3.

PART III.

EXCLUSIVE JURISDICTION—PERSONS UNDER DISABILITY.

CHAPTER I.

MARRIED WOMEN—SEPARATE ESTATE.

In no respect do the rules of equity show a more complete divergence from those of the common law than in the subject of the rights and liabilities of married women.

Rights of *feme covert* at common law.

The husband takes all her property as a general rule.

By the common law the husband on marrying becomes entitled to receive the rents and profits of the wife's real estates during their joint lives;[1] he becomes absolutely entitled to all her chattels personal in possession,[2] and to her choses in action if he reduce them into possession;[3] or if he do not, as administrator of his wife if he survive her;[4] and he also becomes entitled to her chattels real, with full power to aliene them even though reversionary;[5] though if he die before his wife without having reduced into possession her choses in action,[6] or without having aliened her chattels real,[7] they will survive to her.

The husband acquires this interest in the property

[1] *Polyblank* v. *Hawkins*, Doug. 329; *Moore* v. *Vinten*, 12 Sim. 161.
[2] Co. Litt. 300 *a*.
[3] *Scawen* v. *Blunt*, 7 Ves. 294; *Wildman* v. *Wildman*, 9 Ves. 174; Co. Litt. 351.
[4] *Betts* v. *Kimpton*, 2 B. & Ad. 277; *Proudley* v. *Fielder*, 2 My. & K. 57.
[5] *Donne* v. *Hart*, 2 Russ. & My. 363; *Bates* v. *Dandy*, 2 Atk. 207; 3 Russ. 72, n.
[6] Co. Litt. 351 *b*.
[7] Ibid.

of his wife in consideration of the obligation, which upon marriage he contracts, of maintaining her. But while the courts of common law were thus active in enforcing the rights of the husband, they did so to the detriment of the wife; they gave her no remedy whatever in case of the husband's refusing or neglecting to fulfil the duties thus cast upon him, or in the case of the husband's bankruptcy or insolvency. In all these cases, therefore, a married woman resorting to the common law might have been left utterly destitute, no matter how large the fortune she might have brought to her husband on marriage. Can it be a matter of surprise, therefore, that equity, holding that there should be no wrong without a remedy, found ample ground for its interference, and raised up, with reference to married women, a system founded on justice and right, and utterly in contravention of the doctrines of the common law.

In consideration of maintaining her.

Wife remediless at common law.

Interference of equity.

So beneficial has this equitable jurisdiction proved to be, and so much in harmony with the requirements of modern society, that it has at length received a legislative sanction. By the Married Women's Property Act, 1870, a *feme covert* is enabled to obtain a legal title to certain classes of property, and to protect the same by independent proceedings in courts of law, in the same manner as a *feme sole*.

Married Women's Property Act, 1870, 33 & 34 Vict., c. 93.

Her position under the Act will be treated of hereafter; for the present, it is proposed to consider the original jurisdiction of the Court of Chancery, which, it is apprehended, still continues in its entirety, though with a scope widened by the recent legislation. The mode in which Chancery exercises this beneficial and protective jurisdiction over married women and their property, is twofold—

Protective jurisdiction of Court of Chancery.

I. By the creation of a class of property held to the wife's "separate use," so that her husband shall have no legal control over it.

By permitting wife to hold separate estate.

By allowing her equity to a settlement.

II. By insisting, if necessary, upon the husband making a settlement upon his wife and children out of her property, whenever he is compelled to come into equity in order to reduce such property into possession by virtue of the wife's "equity to a settlement."

1. The wife's separate estate.

I. The wife's separate estate.

At common law the separate existence of the wife is not, as a general rule, known or contemplated, it being considered by the coverture merged in that of the husband, and the wife being no more recognised than is the *cestui que trust* or the mortgagor; the legal estate, which is the only interest the law recognises, being in others.[1] She is not permitted by the common law to take or enjoy any real or personal estate separate from and independent of her husband. But in equity, whose creature the wife's separate estate is,[2] the case is widely different. There a married woman is considered capable of possessing property to her own use, independently of her husband; and upon once being permitted to hold property to her separate use as a *feme sole*, she takes it with all its privileges and incidents, including the *jus disponendi*.[3]

Feme covert cannot at common law hold property apart from her husband. But she may do so in equity.

Separate estate, how created.

The wife may have a separate estate created out of any species of property, and the modes in which it has been held that property may belong to her independently of her husband, are various.

1. By ante-nuptial agreement.

1. The wife may hold separate estate by an ante-nuptial written agreement with the intended husband for that purpose; and such ante-nuptial agreement may be made with reference to her own property, or the property of her husband or of third parties.[4]

[1] *Murray* v. *Barlee*, 3 My. & K. 226.

[2] *Brandon* v. *Robinson*, 18 Ves. 434.

[3] *Fettiplace* v. *Gorges*, 1 Ves. Jr. 48.

[4] *Simmons* v. *Simmons*, 6 Hare, 352; *Tullett* v. *Armstrong*, 1 Beav. 21.

2. By special agreement with the husband after marriage in certain cases,[1] or where the husband deserts her, independently of the stat. 20 & 21 Vict., c. 85.[2]

2. By special post-nuptial agreement, or where he deserts her.

By stat. 20 & 21 Vict., c. 85, s. 21, amended 21 & 22 Vict., c. 108, s. 8, if a wife is deserted by her husband she may obtain an order of protection of her property against her husband and his creditors; and by 20 & 21 Vict., c. 85, s. 25, if judicially separated, she is to be deemed a *feme sole* as regards her property; and in case of subsequent cohabitation, it shall be held to her separate use.[3]

Statutory enactments, as to separate estate, previous to Married Women's Property Act, 1870.

3. Gifts also from the husband to the wife may be made to her separate use, where they are made to her absolutely, and not merely to be worn as ornaments of her person only.[4]

3. By gifts to wife absolutely from husband.

4. It seems also that a gift from a stranger to the wife during her coverture, even though not expressed to be for her separate use, would be for her separate use.[5]

4. By gifts to her from a stranger during coverture.

5. The wife will, of course, hold all such property to her separate use as has been expressly limited to her by devise or otherwise for that purpose, whether before or after coverture.[6]

5. By express limitation for that purpose.

It was formerly supposed that the interposition of trustees was in all arrangements of this sort, whether made before or after marriage, indispensable for the

Interposition of trustees.

[1] *Haddon* v. *Fladgate*, 1 Swab. & Tr. 48; *Pride* v. *Bubb*, L. R. 7 Ch. 64.

[2] *Cecil* v. *Juxon*, 1 Atk. 278; 2 Bright's Husb. & Wife, 299.

[3] *In re Rainsdon's Trusts*, 4 Drew, 446; *Rudge* v. *Weedon*, 4 De G. & Jo. 216, 223.

[4] *Graham* v. *Londonderry*, 3 Atk. 393; *Grant* v. *Grant*, 13 W. R. 1057; *Mews* v. *Mews*, 15 Beav. 529.

[5] *Graham* v. *Londonderry*, 3 Atk. 393; 1 Bright's Husb. & Wife, 289.

[6] St. 1380.

protection of the wife's rights and interests; in other words, it was deemed absolutely necessary that the property, of which the wife was to have the separate and exclusive use, should be vested in trustees for her benefit; and that the agreement of the husband should be made with such trustees, or at least with persons contracting with them for her benefit. But although in strict propriety that should always be done, yet it is now firmly established that the intervention of trustees is not indispensable; and that whenever real or personal property is given or devised to, or settled upon, a married woman, either before or after marriage, for her separate and exclusive use, without the intervention of trustees, the intention of the parties shall be effectuated in equity, and the wife's interest protected against the rights and claims of her husband, and of his creditors also.[1] And in such a case the husband will be held a mere trustee for her.[2]

Unnecessary.

Husband a trustee for wife.

Words creating a separate use. No special form.

No particular form of words is necessary in order to vest property in a married woman for her separate use. It has been held that the marital rights of the husband will be defeated if there is a gift or settlement of property to his wife or trustees for her, for her "sole and separate use,"[3] "for her own use, and at her own disposal,"[4] "for her own use, independent of her husband,"[5] "for her own use and benefit, independent of any other person,"[6] "that she should receive and enjoy the issue and profits."[7] As to the effect of a devise to a woman, "for her sole use and benefit," there seems to be some doubt upon the authorities. In *Gilbert* v. *Lewis*,[8] Westbury, C., held that a devise to an unmarried woman without the intervention of trustees,

[1] *Newlands* v. *Paynter*, 4 My. & Cr. 408.
[2] *Parker* v. *Brooke*, 9 Ves. 583; *Rich* v. *Cockell*, 9 Ves. 375; St. 1380.
[3] *Parker* v. *Brooke*, 9 Ves. 583.
[4] *Inglefield* v. *Coghlan*, 2 Coll. 247.
[5] *Wagstaffe* v. *Smith*, 9 Ves. 520.
[6] *Glover* v. *Hall*, 16 Sim. 568.
[7] *Tyrrell* v. *Hope*, 2 Atk. 558.
[8] 1 De G. Jo. & Sm. 38.

for her sole use and benefit, did not give to her a separate estate.[1]

Intention to exclude marital right must be plain. What words held not sufficient for that purpose.

On the other hand, it is no less firmly established that courts of equity will not deprive the husband of his rights at law, except by words which leave no doubt of the intention to exclude him. It has been held, therefore, that no separate use was created where there was a mere direction, "to pay to a married woman and her assigns,"[2] or where there was a gift, "to her own use and benefit,"[3] or to her "absolute use,"[4] or when payment was directed to be made "into her own proper hands, to and for her own use and benefit,"[5] or when property was given "to be under her sole control."[6]

The wife's power of disposition over separate estate.

The rule is laid down in *Peacock* v. *Monk*,[7] "that a *feme covert* acting with respect to her separate property is competent to act in all respects as if she was a *feme sole*."[8]

As to personalty. She may dispose of it without the husband's consent.

1. It is decided that personal property settled upon a *feme covert* for her separate use, is subject to all the incidents of property vested in persons *sui juris*, and she may dispose of it without her husband's consent, whether by act *inter vivos*,[9] or by will,[10] and this power extends to interests in reversion, as well as to those in possession.[11]

2. As to real estate, it is also determined that when

[1] *In re Tarsey's Trusts*, 1 L. R. Eq. 561.
[2] *Lumb* v. *Milnes*, 5 Ves. 517.
[3] *Kensington* v. *Dollond*, 2 My. & K. 184.
[4] *Ex parte Abbott*, 1 Deacon, 338.
[5] *Tyler* v. *Lake*, 2 Russ. & My. 183.
[6] *Massey* v. *Parker*, 2 My. & K. 174.
[7] 2 Ves. 190.
[8] *Hulme* v. *Tenant*, 1 L. C. 439.
[9] *Wagstaffe* v. *Smith*, 9 Ves. 520.
[10] *Fettiplace* v. *Gorges*, 3 Bro. C. C. 8; *In the goods of Smith*, 1 Sw. & Tr. 125.
[11] *Sturgis* v. *Corp*, 13 Ves. 190; *Leehmere* v. *Brotheridge*, 32 Beav. 353.

As to realty. She may freely dispose of her life estate.

settled to the separate use of a married woman, she has the same power over her *life interest* therein, as she would have as a *feme sole*, and a contract to sell or mortgage that interest has been always specifically enforced against her.[1]

As to her fee simple estates. She may dispose of by will or deed, as if a *feme sole*.

With regard to real property settled to the separate use of a *feme covert* in fee, it has finally, after much conflict of authorities, been decided in the important case of *Taylor* v. *Meads*,[2] that she may dispose of it either by will or by an instrument *inter vivos*, not acknowledged under the Fines and Recoveries Act.[3] And she has this power whether trustees be interposed or not.[4] And even if trustees be interposed, it is now clear that a married woman can bind her separate property without their assent, unless that is rendered necessary by the instrument giving her the property.[5]

Assent of trustees not necessary.

Separate property liable for her breach of trust. Except restrained from anticipation.

Upon the principle that a married woman as to her separate property is to be deemed a *feme sole*, she will render it liable by concurring with her trustees in a breach of trust,[6] or by herself committing a breach of trust in respect of other property under the trust,[7] unless she is restrained from anticipation.[8]

The savings or income of separate estate are also separate estate.

If the wife, having property settled to her separate use, effect savings out of it, she has the same power and control over those savings, as she had over the separate estate itself; for in the quaint language of Lord Keeper Cowper, "the sprout is to savour of the

[1] *Stead* v. *Nelson*, 2 Beav. 245; *Major* v. *Lansley*, 2 Russ. & My. 357.
[2] 34 L. J., Ch. 203; *Pride* v. *Bubb*, L. R. 7 Ch. 64.
[3] 3 & 4 Will. IV., c. 74, s. 77.
[4] *Hall* v. *Waterhouse*, 13 W. R. 633.
[5] *Essex* v. *Atkins*, 14 Ves. 542; *Hodgson* v. *Hodgson*, 2 Kee. 704.
[6] *Brewer* v. *Swirles*, 2 Sm. & Giff. 219; *Jones* v. *Higgins*, L. R. 2 Eq. 538.
[7] *Clive* v. *Carew*, 1 J. & H. 199.
[8] *Davies* v. *Hodgson*, 25 Beav. 186; *Pemberton* v. *M'Gill*, 1 Drew. & Sm. 266.

root and to go the same way;"[1] in other words, if the wife have a power over the capital, she has also power over the income and accumulations.[2]

"A wife having property settled for her separate use is entitled to deal with the money as she pleases. If she directly authorises the money to be paid to her husband, he is entitled to receive it, and she can never recall it. . . . . If the husband and wife living together, have for a long time so dealt with the separate income of the wife as to show that they must have agreed that it should come to the hands of the husband, to be used by him (of course, for their joint purposes), that would amount to evidence of a direction on her part that the separate income, which she otherwise would be entitled to, should be received by him;"[3] and even, in cases where she is entitled to an account against him for such receipts, the general rule seems to be, that he shall be obliged to account for one year's receipts only.[4]

She may permit her husband to receive it.

In any case she is entitled to only one year's account.

If a *feme covert* having personal estate settled to her separate use, die without disposing of it, the husband will be entitled to it; as to so much thereof as may consist of cash, furniture, or other personal chattels, or chattels real,[5] he will take in his marital right,[6] and as to so much as may consist of "choses in action," he will be entitled to take as her administrator.[7]

Husband takes separate personal estate undisposed of.

Jure mariti.

Or as her administrator.

Although a man having a general power of appointment over property, which, in default of appointment, goes to others, by exercising his power makes the

Property limited to such uses as a *feme covert* shall appoint.

[1] *Gore* v. *Knight*, 2 Vern. 535.
[2] *Newlands* v. *Paynter*, 4 My. & Cr. 408; *Humphrey* v. *Richards*, 2 Jur. N. S. 432.
[3] *Caton* v. *Rideout*, 1 Mac. & G. 601; *Rowley* v. *Unwin*, 2 K. & J. 138.
[4] Lewin Tr. 549; Peachey on Settlements, 291; but see *Darkin* v. *Darkin*, 17 Beav. 578.
[5] Co. Litt. 46 *b.*; Dyer, 251.
[6] *Molony* v. *Kennedy*, 10 Sim. 254; *Johnstone* v. *Lumb*, 15 Sim. 308.
[7] *Proudley* v. *Fielder*, 2 My. & K. 57.

Difference between property and power of appointment in a married woman.

appointed property assets for payment of his debts,[1] if a married woman exercises such a power, although having a life estate to her separate use, the appointed property will not be applicable to the payment of her debts, except only in the single case of her fraud. It is necessary to distinguish carefully between property and power. A power of appointment in a married woman is a very different thing from property to her separate use. Separate use is purely a creature of equity, and utterly unknown to the common law; whereas that a married woman has the right and capacity to exercise a power of appointment is as much the doctrine of a court of law, as it is of a court of equity. It is not necessary she should be regarded as a *feme sole* in order to do that; although in equity she is a *feme sole* as regards her separate estate, and may contract by express agreement a debt payable out of that property, she cannot, by mere contract, incur a debt payable out of her property, over which she has a mere power of appointment, because she cannot contract a debt except to the extent of such property as is settled to her separate use; therefore her ordinary creditors have no right to be paid out of the fund which she appointed. But, notwithstanding the incapacity of a married woman to incur a debt merely by contract, yet it is well established that a married woman is capable of committing a fraud, and is liable to be visited with the consequences of the commission of such fraud;[2] that by fraud she renders her general property liable; and further that, if it be insufficient, then, as in the case of a *feme sole*, or a man, the appointed fund becomes liable to supply any deficiency.[3]

Separate property not recognised at common law.

Her right to execute a power recognised at law and in equity.

Feme covert cannot contract a debt to bind her general property.

Except in case of fraud.

In case of her fraud, her property generally being liable, a fund appointed by her is also liable.

Although from an early period courts of equity had so far departed from the settled rules of law with

[1] *Jenney* v. *Andrews*, 6 Mad. 264.
[2] *Savage* v. *Foster*, 9 Mod. 35; *Blain* v. *Terryberry*, 11 Gr. 286.
[3] *Vaughan* v. *Vanderstegan*, 2 Drew. 165, 363; *Shattock* v. *Shattock*, L. R. 2 Eq. 182.

respect to a *feme covert*, as to admit of property being settled in trust for her separate use, and had established the principle that with respect to property so settled, she should be considered a *feme sole*, *quoad* the capacity of enjoying and the capacity of disposing of that property; it is remarkable how long and steadily they refused to grant to her the other capacity of a *feme sole*, that of contracting debts. It might very reasonably be considered that consistency required that she should have that capacity to the same limited extent to which she was constituted a *feme sole*, although to have extended her capacity of contracting debts beyond that limit would have been clearly a violation of all principle. After a time, however, being pressed by the injustice of allowing her, after having solemnly and deliberately entered into an engagement for the payment of money to continue in the enjoyment of her separate property without paying her creditors, the courts, at first, so far ventured to hold that if she made a contract for payment of money by a written instrument, with a certain degree of formality and solemnity, as by a bond under her hand and seal,[1] in that case, the property settled to her separate use should be made liable to the payment of it; and this principle, if principle it could be called, was subsequently extended to instruments of a less formal character, such as to bills of exchange,[2] or promissory-notes,[3] and ultimately to any written agreement.[4]

Though generally regarded as a *feme sole* in equity as to her separate estate, she could not originally bind her separate estate with debts.

The rule relaxed.

Her separate estate was bound by an instrument under seal.

By bill or note.

By ordinary written agreement.

But still the courts refused to extend it to a verbal agreement, or other common assumpsit; and even as to those more formal engagements which they did

[1] *Hulme* v. *Tenant*, 1 L. C. 435; *Heatley* v. *Thomas*, 15 Ves. 596.

[2] *Stuart* v. *Kirkwall*, 3 Mad. 387; *Owen* v. *Homan*, 4 H. L. Cas. 997; *M'Henry* v. *Davies*, L. R. 10 Eq. 88.

[3] *Bullpin* v. *Clarke*, 17 Ves. 365; *Field* v. *Sowle*, 4 Russ. 112.

[4] *Master* v. *Fuller*, 1 Ves. Jr. 513; *Murray* v. *Barlee*, 3 My. & K. 209; *Picard* v. *Hine*, L. R. 5 Ch. 274.

Equity would not allow her to bind her separate estate on a common assumpsit.

hold to be payable out of the separate estate, they struggled against the notion of their being regarded *as debts*, and for that purpose they invented reasons to justify the application of the separate estate to their payment, without recognising them as debts, or letting in verbal contracts. One suggestion was that

Erroneously held that charging the separate estate was executing a power of appointment.

the act of disposing of, or charging separate estate by a married woman, was in reality the execution of a power of appointment, and that a formal and solemn instrument in writing would operate as an execution of the power, which a mere assumpsit would not do.[1] The fallacy of this reasoning has been repeatedly exposed, and it has been truly observed:—1st,

Power and separate property confounded.

that it confounds two things which are quite distinct in their nature, power, and separate use; 2nd, that even supposing the act of disposing of separate estate by a married woman to be regarded as the execution of a power, the reason assigned violated the principle long established with respect to powers, that a power could not be executed by an instrument which did not refer either to the power itself, or to the property

Appointees under a power rank in order of time.

which was the subject of it; and 3rd, that if there be several of such instruments, and they are to be regarded as successive executions of a power, the appointees would rank in the date of the order of their appointments, whereas it is held that where the persons claiming under such instruments are let in

Creditors of separate estate take *pari passu*.

upon the separate property of the party executing them, they must stand *pari passu*. Another reason suggested was, that as a married woman has the right and capacity specifically to charge her separate estate, the execution by her of a formal written instrument must be held to indicate an intention to create such special charge, because otherwise it could not have any operation.[2]

[1] *Murray* v. *Barlee*, 3 My. & K. 223; *Owens* v. *Dickenson*, 1 Cr. & Ph. 53.

[2] *Murray* v. *Barlee*, 3 My. & K. 223.

The inconsistency of drawing this distinction between the different engagements of a married woman having separate estate, with reference to the different forms in which they are contracted, together with the unsatisfactory character of the reasons assigned to justify such distinction, has forced itself more and more on the attention of successive judges; and a growing tendency has been manifested to adopt a more consistent course, by holding, 1st, That to the same extent to which a married woman is, by courts of equity, constituted a *feme sole* with respect to the capacity of disposing of property, she ought also to be regarded as a *feme sole* with respect to the capacity of contracting debts, or engagements in the nature of debts; and, 2nd, as a corollary of the former, that all such debts or engagements should stand on the same footing, in whatever form contracted.[1] And, perhaps, it may now be considered as settled, that her separate estate may be rendered liable on an assumpsit or verbal engagement. For Kindersley, V.-C., in *Matthewman's case*,[2] says:—

Courts now hold that to the same extent that she is regarded as *feme sole*, she may contract debts.

"It clearly is not necessary that the contract should be in writing, because it is now admitted that if a married woman enters into a verbal engagement, expressly making her estate liable, such contract would bind it; nor is it necessary that there should be an express reference made to the fact of their being such separate estate, for a bond or promissory-note given by a married woman, without any mention of her separate estate, has long been held sufficient to make her separate estate liable. If the circumstances are such as to lead to the conclusion that she was contracting not for her husband, but for herself, in respect of her separate estate, that separate estate will be liable to satisfy the obligation."[3]

Her verbal engagements now binding on her separate estate.

[1] *Vaughan* v. *Vanderstegan*, 2 Drew. 182.

[2] L. R. 3 Eq. 787.

[3] L. J. Turner's remarks in *Johnson* v. *Gallagher*, 3 De G. F. & Jo. 494.

No personal decree against a *feme covert.*

The court can make no personal decree against a married woman.[1] The extent of the relief afforded by equity against the separate estate of a *feme covert* is thus laid down by Lord Thurlow in *Hulme* v. *Tenant:*[2]

General engagements bind—the *corpus* of her personalty—rents and profits of her realty.

"Determined cases seem to go thus far, that the general engagement of the wife shall operate upon her *personal property*, shall apply to the *rents and profits of her real estate.* . . . I know of no case where the *general engagement* of the wife has been carried to the extent of decreeing that the trustees of her real estate shall make *conveyance* of that real estate, and by *sale*, *mortgage*, or otherwise, raise the money to satisfy that general engagement on the part of the wife."[3] But since the cases of *Taylor* v. *Meads* and *Hall* v. *Waterhouse*,[4] it appears probable that the *corpus* of real estate will be held to be bound by a married woman's general engagements.[5]

And now probably the *corpus* of her realty.

Bill for administration of separate estate.

Creditors of a married woman may after her death file a bill against her representatives for the administration of her separate estate, which will be treated as equitable assets.[6]

Origin of restraint on anticipation.

It has been seen that when first property was permitted to be settled to the separate use of a married woman, equity viewed her as a *feme sole* to the extent of having dominion over the property. It was, however, soon found that the concession to the requirements of justice, though useful and operative in securing to her a dominion over the estate so devoted to her support, was open to this difficulty, that she being at liberty to dispose of it as a *feme sole* might have disposed of it, was nevertheless left exposed to the

[1] *Francis* v. *Wigzell*, 1 Mad. 264.

[2] 1 L. C. 440.

[3] *Francis* v. *Wigzell*, 1 Mad. 258; *Aylett* v. *Ashton*, 1 My. & Cr. 105, 112.

[4] Ubi supra, p. 288.

[5] But see dicta in *Shattock* v. *Shattock*, L. R. 2 Eq. 182.

[6] *Owens* v. *Dickenson*, 1 Cr. & Ph. 48; *Gregory* v. *Lockyer*, 6 Madd. 90; but see *Shattock* v. *Shattock*, ubi supra.

persuasion or other mode of influence of her husband, which was often found to defeat the very purpose for which her separate property was given her. To meet, therefore, this new difficulty, a provision was adopted of prohibiting the anticipation of the income, so that the wife should have no dominion over it till the payments actually became due.[1] And this mode of settlement was supported on the following reasoning:—That separate estate is purely a creature of equity, devised for the protection of married women, and that being such, equity has a right to act upon its own creature, and to modify it so as to further the object for which separate estate was first created.[2] It was for some time thought that a similar fetter might be imposed on property enjoyed by men, without relation to the married state, but Lord Eldon, in *Brandon* v. *Robinson*,[3] decided that in the case of disposition to a man, the *jus disponendi* cannot be taken away from him by a mere prohibition against alienation.

Liability of separate estate to be destroyed by husband's influence. *Feme covert* prohibited against taking the income before actually due.

A man or *feme sole* cannot be so prohibited.

The power of courts of equity to impose restraints upon the alienation by married women of their separate property having been established, the question next arose as to whether these restraints were to be confined to an actually existing coverture, or might be extended to take effect upon a future marriage. After much conflict of opinion it was eventually determined, in *Tullett* v. *Armstrong*,[4] that the restriction attached to a subsequent marriage. The Master of the Rolls, in that case, lays down the following general propositions on the nature and effect of the clause in restraint of anticipation:—

The restraint attaches to future coverture.

General rules.

"If the gift be made for her sole and separate use without more, she has, during her coverture, an alienable estate independent of her husband.

She has a *jus disponendi* over her separate property.

[1] *Pybus* v. *Smith*, 3 Bro. C. C. 339.
[2] *Tullett* v. *Armstrong*, 1 Beav. 22.
[3] 18 Ves. 429.
[4] 1 Beav. 1.

If restrained, she is entitled to the present enjoyment exclusively.

"If the gift be made for her sole and separate use, without power to alienate, she has, during the coverture, the present enjoyment of an unalienable estate independent of her husband.

Separate estate with or without restraint exists only during coverture.

"In either of these cases she has, when discovert, a power of alienation; the restraint is annexed to the separate estate only, and the separate estate has its existence only during coverture; whilst the woman is discovert, the separate estate, whether modified by restraint or not, is suspended and has no operation, though it is capable of arising upon the happening of a marriage. The restriction cannot be considered distinctly from the separate estate of which it is only a modification; to say that the restriction exists is saying no more than that the separate estate is so modified. . . . If there be no separate estate, there can be no such restriction, as that which is now under consideration. The separate estate may, and often does, exist without the restriction, but the restriction has no independent existence; when found, it is a modification of the separate estate, and inseparable from it."[1]

Will arise on marriage. Restraint on alienation depends on, and is a modification of separate estate—and has no independent existence.

When discovert, she has full powers of alienation.

Inasmuch as a woman, when discovert, has full power of alienation over her separate estate, even though coupled with a restraint against alienation, the question sometimes arises, whether the lady has not by her acts acquired the property unfettered or unrestricted by any trust or restraint, so that neither would attach upon her marriage, as they would have done in the absence of such acts. Thus, in *Wright* v. *Wright*,[2] stock was bequeathed to a woman upon trust for her separate use, without power of anticipation, but without the intervention of trustees; she afterwards, being discovert and *sui juris*, sold the stock, spent a portion of he proceeds, and invested the rest in shares of a joint-

In what cases the trust will be wholly destroyed, so as not to attach on marriage.

[1] *Woodmeston* v. *Walker*, 2 Russ. & My. 197.

[2] 2 J. & H. 647.

stock bank and Canada bonds. *Held*, that by doing so she had determined the trust for her separate use. Wood, V.-C., said:—"Had she allowed the property to remain *in statu quo*, had she left it until her marriage in the form of investment in which it was bequeathed to her by her parents, then, according to *Newlands* v. *Paynter*,[1] the husband must have been considered as adopting the property in the state in which they left it, and subject to the trusts, that, while in that state, they had impressed upon it. But she did not leave it in that form; having the sole ownership of the property, and being single and *sui juris*, she sold it and received the purchase-money. When the property was in her hands as money, it was absolutely hers, as if it had never been fettered by any trust whatever. By selling the property, she disposed of it finally and entirely."[2]

If property remained *in statu quo*, husband must take it with the trusts impressed upon it.

But if she sell it, and receive the purchase-money, the trust is destroyed.

As in the case of the separate use, no particular form of words is necessary to restrain alienation, if the intention be clear. Thus, when property was settled, and it was directed that the trustees should, during the lady's life, receive the income "when and as often as the same should become due," and pay it to such persons as she might from time to time appoint, or to permit her to receive it for her separate use; and that her receipts, or the receipts of any person to whom she might appoint the same *after it should become due*, should be valid discharges for it; it was held that she was restrained from anticipating the income.[3] So also where property is given to the separate use of a married woman, "not to be sold or mortgaged," she will take with a restraint on alienation.[4]

What words will restrain alienation.

On the other hand, where a testator bequeathed a sum of stock in trust for the separate use of his wife

What words held not sufficient.

[1] 4 My. & Cr. 408.
[2] *Buttanshaw* v. *Martin*, Johns. 89.
[3] *Field* v. *Evans*, 15 Sim, 375; *Baker* v. *Bradley*, 7 De G. M. & G. 597.
[4] *Steedman* v. *Poole*, 6 Ha. 193; *Bagget* v. *Meux*, 1 Coll. 138.

for her life, and directed that it should remain during her life, and be under the order of the trustees, made a duly administered provision for her, and the interest given to her *on her personal appearance and receipt*, by any banker the trustees might appoint, it was held that the widow, who had married again, was not restrained from alienating her interest in the stock.[1] Where expressions are used giving the wife a right to receive separate property "with her own hands from time to time," or so that her receipts "alone, for what should be actually" paid into her own proper hands should "be good discharges," they are, to use the words of Lord Eldon, "only an unfolding of all that is implied in a gift to the separate use."[2]

"On her personal appearance and receipt."

Court of equity cannot dispense with the fetter on alienation.

But although it be true "that these cases of separate uses and restraints are mere creatures of equity," still it does not follow that a court of equity can dispense with or mould this fetter as, and when, it thinks fit, any more than it could do so with other trusts. It was held, therefore, where a testator gave a legacy to a married woman upon condition that within twelve months she conveyed her separate estate which was subject to a restraint against anticipation, that the court had no power to release it from that restraint, even where it would be clearly for her benefit.[3]

Married Women's Property Act 1870, 33 & 34 Vict., c. 93.

Such being the rights and liabilities of married women, arising from the equitable doctrine of separate estate, it remains to consider their position under the Married Women's Property Act 1870. By this act, which came into operation on the 9th of August 1870, the principles which had proved so beneficial,

[1] *In re Ross's Trust*, 1 Sim. N. S. 196.

[2] *Parkes* v. *White*, 11 Ves. 222; *Acton* v. *White*, 1 Sim. & St. 429; *Rose* v. *Sharrod*, 11 W. R. 356.

[3] *Robinson* v. *Wheelwright*, 21 Beav. 214; 6 De G. M. & G. 535; *Gaskell's Trusts*, 11 Jur. N. S. 780; but see *Sanger* v. *Sanger*, L. R. 11 Eq. 470, decided under 33 & 34 Vict., c. 93, s. 12.

as applied in courts of equity, have been recognised and adopted, at the same time that increased powers for the acquisition and protection of separate property have been conferred thereby. Not only have new classes of separate property been created, and greater facilities for its beneficial investment been given, but a *feme covert* is now enabled to take proceedings, both at law and in equity, for the protection of her property, freed from the disabilities heretofore attaching to coverture, without losing, as it appears, except in certain cases specified by the act,[1] her previous position of immunity from adverse legal proceedings.

Distinction between statutory and equitable separate property.

In considering the provisions of the act, it will be necessary to bear in mind the distinction between statutory separate property, declared to be such by the act, and separate property, which does not owe its character as such to the act, and therefore remains within the jurisdiction of courts of equity only. It appears that the former class alone carries with it the legal powers and privileges conferred by the act; but it is apprehended that both classes are not equally subject to the new liabilities, now imposed upon women, in respect to their separate property.[2]

Statutory separate property.

1. Wages and earnings of all married women, acquired after the passing of the act.

By section 1, it is enacted that the wages and earnings of any married woman, acquired or gained by her, after the passing of the act, in any employment, occupation, or trade, in which she is engaged, or which she carries on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of such wages, earnings, money, or property, shall be deemed and taken to be property held and settled to her separate use, independent of

[1] Sections 12, 13, & 14; *Sanger* v. *Sanger*, L. R. 11 Eq. 470.
[2] Ibid.

any husband to whom she may be married; and her receipts alone shall be a good discharge for such wages, earnings, money, and property.

2. Personalty devolving on women married on or after August 9, 1870, "ab intestato;" and sums of money under any deed or will not exceeding £200.

By section 7, it is enacted that where any woman, married after the passing of the act, shall during her marriage become entitled to any personal property as next of kin, or one of the next of kin of an intestate, or to any sum of money not exceeding two hundred pounds, under any deed or will, such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to the woman for her separate use; and her receipts alone shall be a good discharge for the same.

3. Rents and profits of real estate devolving "ab intestato" on women married on or after August 9, 1870.

By section 8, it is enacted that where any freehold, copyhold, or customary hold property shall descend upon any woman married after the passing of the act, as heiress or coheiress of an intestate, the rents and profits of such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to such woman for her separate use; and her receipts alone shall be a good discharge for the same.

4. Investments.

By section 2, married women are enabled to invest their separate property in savings' banks and Government annuities; by section 3, in the public funds;[1] by section 4, in shares and debentures, to which no liability is attached, in any incorporated or joint-stock company; and by section 5, in similar shares in friendly and benefit societies, duly registered. But the mere investment under these clauses of a fund not otherwise separate property, without the husband's consent, cannot, it is submitted, give such fund the character of separate

[1] *In re Bartholomew's Estate,* 19 W. R. 95. *In re Butlin's Trusts,* 19 W. R. 241.

estate, so as to defeat or prejudice the husband's equities.

5. Life policies.

By section 10, a married woman may affect an insurance on her own or her husband's life to her separate use; and similarly a married man may insure his own life, so as to create a trust for the separate use of his wife, according to the interest expressed on the face of the policy.

The act gives a married woman a good *prima facie* legal title to all the above mentioned classes of property, as her statutory separate property. It will be observed that the act does not affect property passing under any deed or will, other than sums of money not exceeding £200.

Equitable separate property by express limitation.

With the above exception, an express limitation to separate use will still be necessary, and property so limited will fall under the class which has, for the sake of distinction, been called equitable separate property. Gifts of jewellery and trinkets, as distinct from paraphernalia, made during the coverture, either by the husband or by a stranger, will also apparently fall within this class.

Husband's creditors.

The rights of the husband's creditors are reserved by section 6 against property fraudulently deposited or invested by him in his wife's name; and the creditors are enabled to follow such property as though the act had not been passed.

Questions between husband and wife.

Under section 9, a summary remedy is given to husband or wife, in all questions between them as to property declared by the act to be the separate property of the wife. Either party may apply by summons or motion, without bill filed, to the Court of Chancery or the County Court, irrespective of the value of the property in question.

Wife's right of action at law.

By section 11, it is enacted that a married woman may maintain an action in her own name for the recovery of any wages, earnings, money, and property *by the act declared to be her separate property*, or of any property belonging to her before marriage, and which her husband shall, by writing under his hand, have agreed shall belong to her after marriage as her separate property, and she shall have in her own name the same remedies, both civil and criminal, against all persons whomsoever for the protection and security of such wages, earnings, money, and property, and of any chattels or other property purchased or obtained by means thereof, for her own use, as if such wages, earnings, money, chattels and property belonged to her as an unmarried woman; and in any indictment or other proceeding it shall be sufficient to allege such wages, earnings, money, chattels, and property to be her property.

Wife's liability for her debts contracted before marriage.

By section 12, it is enacted that a husband shall not by reason of any marriage which shall take place after the act has come into operation, be liable for the debts of his wife contracted before marriage; but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy, such debts, as if she had continued unmarried. The defect of this section appears to be, that, as it is left at the option of the husband and wife whether there shall be any reservation of separate property on the marriage, they may by omitting to make such reservation, whether collusively or innocently, defeat the only remedy left to her ante-nuptial creditors by the act. It has been decided that the restriction against anticipation is no bar to the creditors' rights.[1]

For maintenance of hus-

By section 13, a married woman possessed of separate property is made liable for the maintenance of a

[1] *Sanger* v. *Sanger*, L. R. 11 Eq. 470.

pauper husband; and by section 14, she must maintain her children, subject, however, to the father's primary liability to maintain them. band and children.

The effect of the act is to place married women in a highly beneficial if somewhat anomalous position. Proceedings adverse to married women, in relation to their separate estate, must, apparently, still, as heretofore, be taken in courts of equity, with the exception of cases falling under sections 12, 13, and 14. On the other hand, a *feme covert* may initiate proceedings on her own behalf in courts both of equity and of law. To this extent the act gives to married women an independent status at law, a position which is further fortified by their general capacity to obtain for themselves separate property. It is now sufficient to allege that property in litigation is separate property within the meaning of the act (section 11), to give a married woman a *prima facie* title, and to throw the onus of proof on the person disputing her right. Formerly the onus was on the other side, and it was necessary to prove the existence of separate property before the plaintiff could maintain her suit.[1] The legal capacity, however, to obtain and hold separate property may be held to entail corresponding liabilities, and to affect indirectly the position previously held by married women in equity.[2]

[1] See observations of *Wood*, V.-C., on *Barrack* v. *M'Culloch*, 3 K. & J. 119, 120.

[2] As to the relation of the act to the doctrine of separate use, see Griffith's Married Women's Property Act, 1870.

CHAPTER II.

PIN-MONEY AND PARAPHERNALIA.

Pin-money. For wife's ornament and personal expenditure.

I. PIN-MONEY may be defined as a yearly allowance settled upon the wife before marriage, for the purchase of clothes or ornaments, or otherwise for her separate expenditure; it is in order to deck her person suitably to her husband's rank, who has accordingly an interest in its expenditure. It is a sum allowed for her personal expenses, in order to save the trouble of a constant recurrence by the wife to the husband, upon every occasion of a milliner's bill, upon every occasion of a jeweller's account coming in; not the jeweller's account for the jewels, because that is a very different question—but for the repair and the wear and tear of trinkets, and for pocket-money, and things of that sort; nor, of course, does it mean the carriage, and the house, and the gardens, but the ordinary personal expenses.[1] Gratuitous gifts, or payments from time to time, made to the wife by her husband after marriage, for the same purposes, are also considered as pin-money.[2]

To save the constant recurrence of wife to husband for trifling expenses.

Gratuitous post-nuptial gifts by husband.

Not like her separate estate.

Bearing in mind the objects for which pin-money is given, it follows that it is very different from money set apart for the wife's sole and separate use during the coverture, excluding the *jus mariti;* nor is it to be considered an absolute gift from the husband to the wife. And this difference between the wife's pin-money and her separate estate, is material to be borne

[1] *Howard* v. *Digby*, 8 Bligh. N. R. 265.

[2] 2 Bright H. & W. 288.

in mind where questions arise as to her claim for arrears of pin-money after her husband's death.[1]

The following propositions appear to be authorised by the cases upon the subject :—

1. That when the wife permits her money to run into arrear for a considerable time, upon surviving her husband, she will only be permitted to claim arrears for one year prior to his death ;[2] for the very object of the provision being, to enable the wife to deck her person suitably to her husband's rank, without having recourse to him continually for small sums of money, excludes the supposition that she may accumulate her pin-money while the expenses of her person, and the demands upon her pocket, for those things to which pin-money is applicable, have been defrayed by her husband.[3]

She can claim only one year's arrears.

2. Where, however, it appeared that the wife had complained of her pin-money being paid short, and the husband told her she would have it at last, she was held entitled to *all* arrears due at her husband's death.[4]

When she may claim all arrears.

3. Where the husband has paid for all the wife's apparel, and provided for all her private expenses, she cannot claim for any arrears at the death of her husband, for this will be considered a satisfaction by the husband.[5]

She cannot claim arrears where he has provided her apparel, &c.

4. It seems to follow from the nature and purposes of pin-money, that the wife's executors have no claim

Wife's executors cannot claim even one year's arrears.

[1] 2 Bright H. & W. 288.
[2] *Aston* v. *Aston*, 1 Ves. Sr. 267 ; *Townshend* v. *Windham*, 2 Ves. Sr. 7.
[3] *Howard* v. *Digby*, 8 Bligh, N. R. 269.
[4] *Ridout* v. *Lewis*, 1 Atk. 269.
[5] *Thomas* v. *Bennet*, 2 P. W. 341 ; *Howard* v. *Digby*, 8 Bligh, N. R. 269.

against the husband or his estate, even for one year's arrears.[1]

Paraphernalia include gifts to be worn as ornaments.

II. PARAPHERNALIA.[2]—The paraphernalia of the wife include such apparel and ornaments given to the wife, as are suitable to her condition in life, and expressly given to be worn as ornaments of her person only.[3]

Old family jewels not paraphernalia.

Old family jewels, which have been handed down from father to son, cannot constitute the paraphernalia of the wife, unless she acquires them by gift or bequest.[4]

Post-nuptial gifts by husband expressly for her wear.

Jewels given to the wife by her husband after marriage, will, it seems, be considered her paraphernalia, where they are given her expressly for the purpose of wearing them, as befitting her station in life.[5] But it would also appear that gifts from the husband to the wife, may be made to her separate use, where they are given to her absolutely, and not merely to be worn as ornaments for her person.[6]

Gifts by a stranger before or after marriage.

The better opinion seems to be, that where articles such as ordinarily constitute paraphernalia, are given to the wife, either before or after marriage, by a relative or friend, they will be considered as given to her separate use, in which case she takes them as a *feme sole*.[7]

Wife cannot dispose of paraphernalia during husband's life.

The wife cannot dispose of her paraphernalia by gift or will during her husband's lifetime. But the husband may, by act *inter vivos*, during her life, dispose of her

[1] *Howard* v. *Digby*, 8 Bligh, N. R. 271.

[2] The word paraphernalia is derived from the Greek word παράφερνη, *i.e.*, property belonging to the wife over and above the dower which she brought to her husband.

[3] *Graham* v. *Londonderry*, 3 Atk. 394.

[4] *Jervoise* v. *Jervoise*, 17 Beav. 570.

[5] *Jervoise* v. *Jervoise*, 17 Beav. 571; *Graham* v. *Londonderry*, 3 Atk. 394.

[6] *Graham* v. *Londonderry*, 3 Atk. 394; *Grant* v. *Grant*, 13 W. R. 1057.

[7] *Graham* v. *Londonderry*, 3 Atk. 394; *Lucas* v. *Lucas*, 1 Atk. 270; but see *Jervoise* v. *Jervoise*, 17 Beav. 571.

paraphernalia by sale or gift.[1] He cannot, however, dispose of them by will;[2] but if he does so, and confers other benefits upon the wife by his will, she may be put to her election between her paraphernalia, and any interest which she may take under the will.[3] As the husband may dispose of his wife's paraphernalia in his lifetime, so they will be liable to his debts.[4]

Husband cannot dispose of them by *will*.

Paraphernalia liable to his debts.

With respect to the equity of marshalling the assets in favour of the wife, where the husband dies indebted, and her paraphernalia are taken by his creditors in satisfaction of their demands, after all the general personal estate is exhausted, in the administration of assets, the widow's claim to her paraphernalia is preferred to general legacies, and it follows that she is entitled to marshal assets in all those cases in which a general legatee would have that right.[5]

Widow's claim to paraphernalia preferred to general legacies.

If the alienation by the husband, in his lifetime, of the wife's paraphernalia be not absolute, but as a pledge or security for money, his wife surviving him will be entitled to have them redeemed out of his personal estate, even to the prejudice of legatees, because her right is anterior, and to be preferred to their claims, which are merely voluntary.[6]

On partial alienation by husband, must be redeemed out of the personal assets, as against legatees.

[1] *Seymore* v. *Tresilian*, 3 Atk. 358.
[2] Ibid.
[3] *Churchill* v. *Small*, 2 Kenyon, pt. 2, p. 6.
[4] *Campion* v. *Cotton*, 17 Ves. 273; and see 2 Ves. Sr. 7.
[5] *Tipping* v. *Tipping*, 1 P. W. 729; *Snelson* v. *Corbet*, 3 Atk. 369; see also p. 239 supra.
[6] *Graham* v. *Londonderry*, 3 Atk. 393.

CHAPTER III.

THE WIFE'S EQUITY TO A SETTLEMENT.

THE husband's rights in his wife's property having been briefly sketched in a previous chapter, it is necessary next to inquire in what cases these rights will be modified in favour of the wife.

Marriage a gift of wife's personal property to husband.

Marriage is a gift to the husband of all the personal property to which the wife is entitled at the time of the marriage, and with the exceptions created by the Married Women's Property Act, 1870,[1] of all the personal property to which she may afterwards become entitled, subject only to the condition of his reducing it into possession during the coverture, and no distinction exists, in this respect, between property to which the wife is entitled in equity, and property to which she is entitled at law. *Primâ facie*, then, the wife's property, whether at law or in equity, becomes the husband's. On what grounds, therefore, is the interference of equity derogating from the husband's legal rights, and compelling him to make a settlement on his wife, to be supported? It will be clearly seen from the previous remarks that her equity to a settlement does not depend on any right of property in her, and this position will appear the more clear when it is considered to what limitation her equity is subject. The amount is discretionary in the court, and if the wife insists upon it, she must claim it for herself and her children, and not for herself alone,—limitations which are wholly inconsistent with a right of property in her.[2]

The husband takes *primâ facie*.

Her equity does not depend on a right of property in her.

[1] See pp. 299–301 supra.

[2] *Osborn* v. *Morgan*, 9 Hare, 434.

The right, then, being thus independent of property, there seems to be no ground on which it can rest, except the control which courts of equity exercise over property falling under their dominion. It is, in truth, the mere creature of equity deduced originally, where the husband sued, from the rule, that he who comes into equity must do equity; that is, the "court refuses its aid to give to the plaintiff what the law would give him, if the courts of common law had jurisdiction to enforce it, without imposing upon him conditions which the court considers he ought to comply with, although the subject of the condition should be one which this court would not otherwise enforce."[1] And inasmuch as a father would not have given his daughter in marriage without insisting on some provision being made for her and her children, so a court of equity, standing *in loco parentis*, will not allow the husband to come into a court of equity for the fortune of his wife without his first making a provision for her.

Her equity arises from the maxim, "He who seeks equity must do equity."

The court imposes conditions on the husband coming as plaintiff.

The principle being thus far recognised where the husband was plaintiff, was next enforced against the assignees of a bankrupt or insolvent husband, upon the ground that the assignees claiming in right of the husband, would be aided upon the same conditions as the court would have imposed upon the husband himself.[2] Subsequently the same rule was held to apply as against an assignee of the husband for valuable consideration. "It would be whimsical, then, that the assignment by the husband for valuable consideration should put the assignee in equity, in a better situation than the husband himself, is at law. The guard of the court upon the wife's interest would be very singular, if the husband, not being entitled at law, must assign it for a valuable consideration to

Principle extended to the husband's general assignees.

Then to particular assignees for value.

[1] *Sturgis* v. *Champneys*, 5 My. & Cr. 102.

[2] *Oswell* v. *Probert*, 2 Ves. Jr. 682.

Wife permitted to assert her right as plaintiff.

another person, who would be entitled in equity."[1] Eventually, the principle was extended to suits instituted by the wife herself, and in *Elibank* v. *Montolieu*,[2] it was decided that as to personalty, where it was perfectly clear that the subject-matter in controversy must be determined and decided upon, and distributed in the Court of Chancery, there the wife might come to assert the equity, and need not wait until the defendant came into court to seek its interference.

Out of what property the wife is entitled to her equity:—

1. Absolute equitable choses in action.

1. Upon the general question of the wife's right to a settlement, out of her absolute equitable choses in action, whether against her husband, or his assignees in bankruptcy, or against a particular assignee for valuable consideration, there is no doubt.[3]

2. Wife's term.

2. As to the husband's power over his wife's leaseholds, and her equity to a settlement out of them against him and his assignees, the rule varies according as the husband's title, in her right, is legal or equitable. In *Hanson* v. *Keeting*,[4] where the husband and wife assigned by way of mortgage, the *equitable* interest of the husband in right of his wife, in a term of years, and the mortgagee filed his bill against the husband, the wife, and the trustee of the legal estate, for a foreclosure and assignment of the term, it was held that the wife was entitled to a provision for life by way of settlement out of the mortgaged premises. Where, however, a similar assignment took place, of the wife's *legal* interest in leaseholds, it was held

Equitable interest in a term.

Legal interest in term.

[1] *Macaulay* v. *Philips*, 4 Ves. 19; *Scott* v. *Spashett*, 3 Mac. & G. 599.

[2] 1 L. C. 381.

[3] *Scott* v. *Spashett*, 3 Mac. & G. 603; *Beresford* v. *Hobson*, 1 Mad. 362; *Burdon* v. *Dean*, 2 Ves. Jr. 608.

[4] 4 Hare 1.

that on the mortgagee filing a bill for foreclosure, the wife had no equity to a settlement out of them, inasmuch as a purchaser took a good legal title from the husband.[1]

Difference between absolute interest and life-interest of wife. Purchaser of absolute interest bound by her equity.

But an important distinction has been made between cases in which the wife takes an *absolute* interest, and those in which she takes a *life*-interest only. As to the former, "it is now clearly settled that a purchaser from the husband of the wife's chose in action, to the corpus of which she is entitled, is in no better situation than the husband himself. On what grounds is it that the court does not apply the same rule where the subject matter of the sale is a life-interest only? I take them to be these:—Where the interest sought to be recovered through the aid of the court is absolute, the court, though enforcing against the husband what is called the wife's equity, acts, in truth, for the benefit, and with a view to the interests not of her only, but also of her children. It deals with the fund in analogy to what a prudent parent would probably have done in giving a portion to his daughter, and the doctrine having been acted on for centuries, ... no purchaser from the husband can be deceived or mistaken as to how his rights will be dealt with here. There is no doubt or ambiguity. He knows that the fund is the fund of a married woman; and that relation alone, without more, gives rise to her rights, and through her, to the rights of her children in this court. If, therefore, he by contract puts himself in the place of the husband, he cannot complain that he should be in no better position than the person to whose rights he succeeds.

Her absolute interest is for benefit of herself and children.

"The case is not the same where the court has to deal with a mere life-interest. No provision in such

[1] *Hill* v. *Edmonds*, 5 De G. & Sm. 603; *Hatchell* v. *Eggleso*, 1 Ir. Ch. R. 215; and see *Pigott* v. *Pigott*, L. R. 4 Eq. 549.

No provision for children out of a life-interest.

a case can be made for the children. The question, then, is one exclusively between the husband and the wife. In directing a settlement of a wife's fortune, the court never (assuming that there is no misconduct in the husband) deprives him of the income of the fund. It is his duty to maintain the wife, and to enable him to do so, this court follows the course of the common law, and gives him a right to what, but for the marriage, would be the natural fund for supporting the wife.

Husband takes the fund as long as he maintains the wife.

Her equity out of a life-interest arises on his failure to maintain her.

"By the marriage, and the duty thereby entered into of maintaining her, he becomes a purchaser of what is reasonably and naturally applicable towards enabling him to perform his duty. It is true, that if he fails in the discharge of that duty, if he deserts his wife and ceases to maintain her, this court will not help him to get at the fund which he can only reach through its process, without securing for the wife a portion of his income. But this is done not by reason only of the relation resulting from the marriage, but because the husband has failed to perform the duties under which he had brought himself; it is an equity enforced in favour of the wife, arising from the husband's misconduct.

Purchaser of life estate not bound to inquire as to whether the husband is maintaining her.

"Now to involve third persons in questions as to how far the husband has or has not duly maintained his wife, would, it has been thought, be inexpedient, and might give rise to discussions irritating and unseemly. It may happen that a husband duly maintaining his wife may, for their common advantage, reasonably sell her life income, and it would be strange that the purchaser's title should be defeated by the subsequent misconduct of the husband in not maintaining his wife."[1]

[1] *Tidd* v. *Lister*, 3 De G. M. & G. 869, 870.

In accordance with the above principles it has been held that a married woman, whose husband has deserted her,[1] or does not maintain her,[2] or has become bankrupt,[3] is not entitled to a settlement out of property in which she has an equitable life-interest, as against a person to whom her husband had assigned it for value *previous* to his desertion or bankruptcy. Nor has she any equity to a settlement out of her life-interest where she is living with and is maintained by her husband, though, as she alleges, in a manner very inadequate to her fortune.[4]

An assignee for value before bankruptcy, desertion or failure to maintain her, has a good title.

A distinction has been taken between the position of a particular assignee for value of the husband, and his general assignee in bankruptcy. The reason for this difference is thus explained by Leach, V.C. :— "Where an equitable interest is given to the wife, *for her life only*, this court does permit the husband to enjoy it without the consent of the wife, and without making any provision for her. It is true that if the husband desert his wife, and fail to perform the obligation of maintaining her, which is the condition upon which the law gives him her property, this court will apply any equitable interest which he retains for the life of the wife, either wholly or in part, for the maintenance of the wife; and if the husband becomes bankrupt, ... this court will fasten the same obligation of maintaining the wife out of the property of this description which devolves by law upon the general assignee, for, *when the title of such assignee vests, the incapacity of the husband to maintain the wife has already raised this equity for the wife;* but the same principle does not necessarily apply to a *particular assignee* for a valuable consideration who purchased this interest *when the husband was maintaining the*

Distinction between a particular and a general assignee.

The husband maintaining his wife may aliene her life-interest.

But a general assignee's right arises at moment when husband becomes incapable of maintaining his wife.

[1] *Wright* v *Morley*, 11 Ves. 12.
[2] *Tidd* v. *Lister*, 10 Hare, 140.
[3] *Elliott* v. *Cordell*, 5 Mad. 149.
[4] *Vaughan* v. *Buck*, 13 Sim. 404.

A particular assignee takes before her equity arises.

wife, and before circumstances had raised any present equity in this property for the wife."[1]

No equity to arrears of income.

The wife is not entitled to any settlement out of arrears of income accruing due, before she has set up any claim thereto, but such arrears will be paid to the husband or his assignees.[2]

3. Equitable realty.

3. As to the equitable realty of a married woman, subject to the distinctions previously pointed out, it has been held that a court of equity will recognise the wife's equity to a settlement, though in the case of her freeholds of inheritance the possible estate of the husband by courtesy will not be interfered with.[3]

Equitable tenant in tail of money to be laid out in land has no equity out of the *corpus*.

In the *Life Association of Scotland* v. *Siddal*,[4] it was held that, where a married woman was equitable tenant in tail of land to be purchased with a sum of trust-money, which she had joined with her husband in mortgaging, she was not entitled to a settlement out of the capital. Turner, L.J., after deciding that she had no equity to a settlement out of the future income, as her husband was maintaining her at the date of the mortgage, said:—"Whatever may be the right of a married woman to have a provision made for her out of the income of an estate of which she is equitable tenant in tail, it is not, as I apprehend, according to the course of the court, or indeed in its power, to order a settlement to be made of the estate or land to be purchased. The equity for a settlement attaches on what the husband takes in right of the wife, and not what the wife takes in her own right; and the estate tail being in the wife, I do not see what power this court can have to order a settlement of it to be made,

Her equity attaches on what the husband takes in her right.

[1] *Elliott* v. *Cordell*, 5 Mad. 149.
[2] *Re Carr's Trusts*, L. R. 12 Eq. 609; 19 W. R. 675.
[3] *Smith* v. *Matthews*, 3 De G. F. & Jo. 139.
[4] 3 De G. F. & Jo. 271.

or to render such a settlement if made, binding and effectual against the wife."

Property legal in its nature, made the subject of a suit in equity, is liable to her equity.

And even when the property, though in its nature legal, becomes from collateral circumstances the subject of a suit in equity, it appears that where the husband or his assignee comes into court as plaintiff, the wife's equity to a settlement will attach. Thus, in *Sturgis* v. *Champneys*,[5] *the provisional assignee* of an insolvent debtor, whose wife was entitled *for life* to real property, was obliged to come into equity to enforce his title to the rents during the joint lives of the husband and wife, in consequence of the legal estate being outstanding in mortgagees. It was argued that the court would not secure a provision for a wife unless the property were such as to be a proper subject of equity; and that in this case Lady Champneys had a legal estate for life, and that it was only by the accident of the prior encumbrance being still existing, and the legal estate outstanding, that the plaintiff was compelled to come into equity. But Lord Cottenham held the wife entitled to a settlement out of the rents of her life-estate. After an examination of the cases on the subject, his lordship said:—"From these authorities, and many others which recognise the same principle, it appears that the equity which this court administers in securing a provision and maintenance for the wife is founded upon the well-known rule of compelling a party who seeks equity to do equity; and it is not possible to conceive a case more strongly calling for the application of that rule. The common law gives to the husband the enjoyment of the life-estate of the wife, upon the ground that he is liable to maintain her, and makes no provision for the event of his failing or becoming unable to perform that duty. If the life-estate be attainable by the husband or his assignee at law, the severity of the law must prevail; but if it cannot be reached otherwise

The rule founded on the maxim, "He who seeks equity must do equity."

Husband may take what he can get, at law.

[5] 5 My. & Cr. 97.

But in equity, the husband, seeking its aid, must make a provision.

than by the interposition of this court, equity though it follows the law, and therefore gives to the husband or his assignee the life-estate of the wife, yet it withholds its assistance for that purpose until it has secured to the wife the means of subsistence; it refuses to hand over to the assignee of the husband, to the exclusion of the wife, the income of the property which the law intended for the maintenance of both. Upon the same principle, the ordinary interposition of this court in compelling a settlement of the property of married women, was originally founded, although the wife is permitted actively to assert her equity as a plaintiff; and if such be the principle, what difference can it make when the assignees of the husband are applying to this court for its assistance to obtain the property, that the estate of the wife is not a trust, but that the recovery at law is prevented only by the existence of a prior legal trust-estate?"

The wife may as plaintiff claim a settlement out of her equitable interests in real estate.

And the rule acted upon in the case of *Elibank* v. *Montolieu*, as to personalty is equally applicable to realty; and not only where the husband or his assignee comes as plaintiff into equity, will her equity to a settlement be enforced against him, but she will also it seems be entitled to a settlement where she is plaintiff, and asks for the aid of the court to settle real property upon her, which the husband or his assignee could not render available without resorting to equity. In *Wortham* v. *Pemberton*,[1] the facts of the case were as follows:— Miss W. was tenant in tail of an estate subject to a jointure, payable to Mrs H., there being a proviso for cesser of the term on the decease of Mrs H. Miss W. married Mr N., who had persuaded her to elope with him, and had been imprisoned for the abduction. It was held that she was entitled to her equity to a settlement. Knight Bruce, V.C., said, "Although she and her husband, or he in her right, may have the imme-

[1] 1 De G. & Sm. 644.

diate legal freehold, there is a legal title which prevents the enjoyment except by means of a court of equity, and renders the title to the rents equitable so long as the term lasts; and it appears to me that the plaintiff is entitled to a settlement out of the rents during the joint lives of herself and her husband, or until the determination of the term." After further discussion, it was held that the settlement could not be made beyond the jointure term, *i.e.*, beyond the life of Mrs H.[1]

Legal freehold made equitable by the existence of a jointure term.

Inasmuch as alienation by the wife will defeat her equity to a settlement, it becomes necessary to consider in what ways a married woman may validly dispose of property, out of which she would otherwise be entitled to claim her equity, so as to preclude herself from afterwards claiming that equity.

Wife's equity defeated by her alienation.

1. In realty. Under 3 & 4 Will. IV., c. 74 (the Act for the abolition of Fines and Recoveries), and 8 & 9 Vict., c. 106, s. 6, a married woman may dispose of her estates of freehold, and may also release or assign any sum of money charged on lands, or the produce of land directed to be sold,[2] whether her interest be in possession or reversion, by a deed duly acknowledged by her, with the concurrence of her husband, in the manner provided by the first-mentioned act.[3] She may also alienate her copyholds by surrender, jointly with her husband, on being separately examined, as to her free consent, by the steward or his deputy.[4]

1. Interests in realty.

2. In personalty. A married woman's interests in personal estate vesting in her husband on marriage, her power of disposition is in abeyance during the coverture, and except in the cases hereafter mentioned, as falling under 20 & 21 Vict., c. 57,[5] she has no power of alienation.

2. Interests in personalty.

[1] But see the remarks of Westbury, L. C., in *Gleaves* v. *Paine*, 1 De G., Jo. & Sm. 93; Dart's V. & P. 529.

[2] *Tuer* v. *Turner*, 20 Beav. 560; *Briggs* v. *Chamberlain*, 11 Hare, 69.

[3] 3 & 4 Will. IV., c. 74, ss. 77, 79.

[4] 1 Watk. Cop. 63.

[5] Post p. 319.

Wife's choses in action belong to husband if he reduce them into possession.

As to the nature and extent of the husband's interest and power over the wife's choses in action, the law says, that marriage is only a qualified gift to the husband of the wife's choses in action, viz., upon condition that he reduce them into possession during the coverture; that if he happen to die before his wife, without having reduced such property into possession, she, and not his personal representatives, will be entitled to it; and that reduction into possession is a necessary and indispensable preliminary to the husband's having any right of property in himself, or to his being able to convey any right of property to another.[1]

Wife surviving her husband takes her reversionary interests which he has not reduced into possession.

In accordance with these principles, it was decided in *Purdew* v. *Jackson*,[2] that where a husband and wife, by deed executed by both, assigned to a purchaser for valuable consideration a fund in which the wife had a vested estate in remainder, expectant on the death of a tenant for life, and both the wife and tenant for life outlived the husband, the wife was entitled by right of survivorship to claim the whole of her share of the fund against such particular assignee for valuable consideration. "I still continue of opinion," said the Master of the Rolls, "that all assignments made by the husband of the wife's outstanding personal chattels, which are not or cannot be then reduced into possession . . . . pass only the interest which the husband has, subject to the wife's legal right by survivorship."[3]

Assignee can take no more than the husband has to give.

Court had not power to take wife's consent to part with her reversionary interest.

It was further decided before the passing of 20 & 21 Vict., c. 57, with regard to the wife's reversionary interests, that the court had not even the power of obtaining the wife's consent to part with them. "If the wife by her consent could pass a remainder or reversion in personal property to the husband, she

[1] *Purdew* v. *Jackson*, 1 Russ. 66.
[2] 1 Russ. 1.
[3] *Elliott* v. *Cordell*, 5 Mad. 149; *Stanton* v. *Hall*, 2 Russ. & My. 175, 182; *Re Duffy's Trusts*, 28 Beav. 386.

would not only part with a future possible equity, but with her chance of possessing the whole property by surviving her husband; and to give this effect to her consent would make it analogous to a fine at law, with respect to real estate, a principle always disclaimed in a court of equity. A court of equity interferes to protect the property of the wife against the legal rights of the husband, and will never lend itself as an instrument to enable the husband to acquire a right in the wife's personal property which he can by no means acquire at law."[1]

For she would lose a future possible equity and her chance of survivorship.

It has been held that a claim by the wife for a settlement out of her reversionary interest in property, so long as it continues reversionary, cannot be supported; on the ground that a court of equity only deals with interests in possession, and that it is not until the property comes to be distributed, that in ordinary cases the court enforces obligations attaching upon the property, otherwise than by contract. The wife's right to a settlement out of that property which the husband at law would, if he could, take possession of, in her right, is an obligation which a court of equity fastens not upon the property, but upon the right to receive it; in fine, the wife's equity arises upon the husband's legal right to present possession; and that, of course, can only apply when the remainder or reversion has ceased to be such, and the property has fallen into possession.[2]

She has no equity out of reversionary interest so long as reversionary.

It is an obligation fastened, not on the property, but on the right to receive it.

By a recent Act of Parliament[3] every married woman, with the concurrence of her husband, may, by deed acknowledged in the manner required by the Fines and Recoveries Act,[4] dispose of every future or reversionary interest, vested or contingent, belonging to such

Malin's Act, 20 & 21 Vict., c. 57.

Feme covert may aliene her reversionary interest in personalty by deed acknowledged.

[1] *Pickard* v. *Roberts*, 3 Mad. 386; *Purdew* v. *Jackson*, 1 Russ. 56.

[2] *Osborn* v. *Morgan*, 9 Hare, 434.

[3] 20 & 21 Vict., c. 57.

[4] 3 & 4 Will. IV., c. 74.

married woman, or her husband in her right, in any personal estate to which she shall be entitled under any instrument (except her marriage settlement) made after the 31st December 1857; she may also release or extinguish any power in regard to any such personal estate, and also release and extinguish her equity to a settlement out of her personal property in possession under any such instrument as aforesaid. But nothing therein contained is to extend to any reversionary interest to which she shall become entitled under any instrument by which she shall be restrained from alienating or affecting the same. And the powers of disposition given by the Act to a married woman shall not enable her to dispose of any interest in personal estate settled on her by any settlement or agreement for a settlement made on the occasion of her marriage.

But not property which she is restrained from alienating. Nor property settled on her marriage.

As to cases not within the act.

If the wife should be entitled to any chose in action, whether legal or equitable, of a reversionary nature, not within the above-mentioned act, the effect of an assignment by the husband will be different under different circumstances. The wife, of course, cannot assign, for by the act of marriage she deprives herself of all power so to do; and the husband can only assign to another the interest to which he may be entitled himself. Suppose, therefore, that the wife is entitled, on the death of A., a person now living, to a sum of stock standing in the name of trustees, and that her husband should make an assignment of this reversionary interest to B., a purchaser; the benefit which will accrue to B., by virtue of the assignment, will vary, according as the husband, the wife, or A., the tenant for life, may die first. If the husband should die first B. will lose his purchase, for the wife having survived her husband, will now, on the death of A., be entitled to the stock, which has never been reduced into the possession of her husband, or of B., his assignee.[1] If A. should die first,

If husband die before reversion falls in, purchaser loses his purchase.

[1] *Purdew* v. *Jackson*, 1 Russ. 1; *Honner* v. *Morton*, 3 Russ. 65.

B. may then obtain a transfer of the stock, if the trustees choose to transfer it to him;[1] and if the wife should not have filed a bill to enforce her equity to a settlement.[2] But if the trustees should refuse to transfer without the direction of the Court of Chancery, or if the wife should insist upon her right, B. can only take the fund after making such settlement as the Court may think fit upon her. If, however, the wife should die first, then this chose in action, remaining unreduced into possession, will, like a legal chose in action, under the same circumstances remain part of the wife's personal estate; and the husband, on taking out administration to his wife,[3] will be bound by his previous assignment. B. will accordingly in this single event obtain the whole fund, subject, however, to the wife's debts, if any.[4]

If reversion falls into possession, the husband and wife living, purchaser will take it subject to her equity.

If wife die first, and then the reversion falls in, purchaser takes all.

Husband bound by his assignment.

The question as to what amounts to a reduction into possession by the husband of his wife's choses in action, is one that generally will depend on the peculiar circumstances of each case. But it may be useful to mention some of the principles by which the court is guided in deciding this question. In *Hornsby* v. *Lee*[5] it was held that a mere assignment of a reversionary chose in action by the husband could not be regarded either as an actual or constructive reduction into possession by the husband.[6] It is also now clearly established, that whether the husbaud dies in the lifetime of the person having a prior interest, whereby the chose in action *cannot*, as against the wife, be reduced into possession, or whether he survives, and dies before it *is actually* reduced into possession, the same result follows —the chose in action will survive to the wife.[7] It has

What amounts to reduction into possession.

Mere assignment of a reversion is not a reduction into possession.

The husband must actually reduce it into possession—the mere power of doing so not sufficient.

[1] *Wheeler* v. *Caryl*, Amb. 121, 122; *Moor* v. *Rycault*, Prec. Ch. 22.

[2] *Greedy* v. *Lavender*, 13 Beav. 62.

[3] 1 Bright's H. & W. 41; *Betts* v. *Kimpton*, 2 B. & Ad. 273.

[4] 29 Car. II., c. 3, s. 25; Wms. Pers. Prop. 380–381.

[5] 2 Mad. 16.

[6] *Le Vasseur* v. *Scratton*, 14 Sim. 116.

[7] *Ellison* v. *Elwin*, 13 Sim. 309.

Husband's transfer of title-deeds, of which his wife was equitable mortgagee, not enough.

also been held that the transfer by a husband of title-deeds of which his wife was equitable mortgagee, to secure a debt of his own, was not a reduction into possession so as to defeat the wife's right of survivorship.[1] The test of reduction into possession of a sum of money was, in a recent case, declared to be, the right of the husband to maintain an action at law for the amount, as money had and received to his use.[2]

Order of court to pay wife's income into a receiver's hands is a reduction into possession.

On the other hand, where the income of a married woman's life estate had been ordered to be received, and applied by a receiver in a suit, in payment of her husband's encumbrances, it was held that arrears of income in the receiver's hands, which had not been paid as directed, were nevertheless, by the effect of the order, reduced into possession, so as to disentitle the wife surviving to such arrears, because the receiver was to be deemed in the nature of an agent for the person entitled by virtue of the order for appropriation.[3]

Settlement, if made, must be on wife *and* children. Though she may waive it, and thus deprive her children.

It has been already observed that the wife's equity, at least in cases where she takes an absolute interest, is not for herself only, but for herself and her children, there being no instance where the settlement has not been made in favour of the children at the same time; and though she may abandon it, and thus prevent her children obtaining any benefit from it, if she claims it for herself, the court requires the benefit to be extended to her children; her equity and the equity of the children are treated as one equity, to be enforced or not, at her option.[4] In no case are the children permitted to assert an independent equity; for in all cases the equity of the wife is personal, and the court acknowledges no original title in the children, who can claim only that provision which the wife thinks fit to secure for herself; and if the wife consent that the husband shall receive

[1] *Michelmore* v. *Mudge*, 2 Giff. 183.

[2] Judgment of James, V.-C., in *Aitcheson* v. *Dixon*, L. R. 10 Eq. 589.

[3] *Tidd* v. *Lister*, 2 W. R. 184.

[4] *De la Garde* v. *Lempriere*, 6 Beav. 344.

the whole property, they are deprived of all provision.

When the right of children becomes indefeasible.

The inquiry now arises,—What is sufficient to create a title in the children. It has been observed that the wife's equity does not depend on the right of property in her, nor does it create a trust in her favour upon the property. "It is only a right to require that a trust shall be created for her, for the benefit of herself and her children. Before the property is impressed with a trust in her favour, it is necessary that some action should have been taken by her. What action is necessary upon her part to raise a trust, or rather, how far that action must have been carried in order to raise a trust, is the question; but some action must have been taken by her and carried to some certain point, otherwise no trust exists. If the property is in the hands of trustees, it is not enough that she should give them notice, in however formal and regular a manner, that she demands a settlement. Notwithstanding any such notice, the trustees may with impunity hand over the property to the husband. Nor can she enforce a settlement for the benefit of herself alone; it must be, if at all, for the benefit of her children, as well as herself. And yet if she has carried her action far enough to establish a trust for herself and her children, she may at any time before the *settlement is completed*, waive and defeat it not only as to her own interests, but also as to the interest of her children."[1] Now the following points, with reference to this doctrine are well established:—

If wife dies before bill filed, children have no right.

1.— That if the wife die before the bill is filed, giving to the court a jurisdiction or dominion over the fund, the children have no right to require a settlement.[2]

[1] *Wallace* v. *Auldjo*, 2 Drew. & Sm. 222.

[2] *Scriven* v. *Tapley*, 2 Eden, 337.

If wife dies after filing of bill, but before decree, children have no right.

2.—That if the wife die, even after she has filed a bill for a settlement, but before decree, her children cannot sustain a bill to have a settlement made on them.[1]

In ordinary cases, a decree is merely declaratory of the previous right of plaintiff.

The general principle of the court is, that if in any ordinary case a person files a bill to assert any right to property, or to enforce any trust, his right is not created by the decree, any more than it is created by the filing of the bill. The decree only decides, or rather declares, what his right was at the time of, and before the filing of the bill. But these principles cannot safely be applied to questions arising with reference to a wife's equity to a settlement. "It is to be recollected that when a woman becomes entitled to a certain property absolutely, say a share of property under a will, ... what she becomes entitled to at that time (that is, by virtue of the will before anything done) is not a trust in equity in the sense of a trust or right of property—the property all belongs at law and in equity *primâ facie* to the husband. But what she becomes entitled to is this—that notwithstanding the marital right, against that right, she has a right to take some action, to do something, or to have something done for her, which shall establish a trust upon that property, in her favour. That is the nature of what is called the wife's equity to a settlement, before anything has been done upon it. And therefore, to reason from such a right as that, as you would from the case of a person who has already got a right of property or a trust actually created . . . . is reasoning in a manner which has been deprecated as dangerous."[2]

Rule different where wife claims her equity.

Her right is merely to limit the *primâ facie* marital right.

3.—That if a decree or order has been made by the court, referring it to the master, under the old prac-

[1] *De la Garde* v. *Lempriere*, 6 Beav. 344; *Lloyd* v. *Mason*, 5 Hare, 149; *Lloyd* v. *Williams*, 1 Mad. 450.

[2] *Wallace* v. *Auldjo*, 2 Drew. & Sm. 227.

tice, or to a Judge in Chambers, under the new practice, to approve a proper settlement, and the wife dies before anything further is done, the children are entitled to the benefit of that decree or order, and may file a bill to enforce such settlement, as the wife, if still living, would have been entitled to.[1]

Right of children as against husband arises on decree.

4.— The children's right to have a settlement executed after the death of their mother, who has claimed her equity to a settlement, also arises where there is a contract by the father, independently of judicial decree, to make a settlement of his wife's property.[2] Yet, after such a decree or contract, but any time before the *execution* of the settlement, the wife, if living, may waive her settlement, and altogether defeat her children.[3] In the words of Wigram, V.-C.,[4] "There may be a case in which the wife is not absolutely bound, but in which, as against the husband, the children are entitled to the benefit of the mother's equity. If the husband is bound, the children are certainly entitled."

Right of children may arise out of contract by father.

Wife may after decree, but before execution, waive her settlement, and so defeat her children.

If husband is bound, the children are entitled.

The wife's right to a settlement will be defeated—

What will defeat her right to a settlement.

1. By the receipt by the husband or his assignees of the fund.[5]

Husband's receipt of the fund.

2. Where the debts, contracted before marriage, for which her husband becomes liable, exceed in amount the fund to which he becomes entitled in her right.[6]

Where her debts exceed the fund.

[1] *Wallace* v. *Auldjo*, 2 Drew. & Sm. 223; *Murray* v. *Elibank*, 1 L. C. 388.

[2] *Lloyd* v. *Williams*, 1 Mad. 450; *De La Garde* v. *Lempriere*, 6 Beav. 344; *Wallace* v. *Auldjo*, 2 Drew. & Sm. 216; Affd. 1 De G. Jo. & Sm. 643.

[3] *Murray* v. *Elibank*, 1 L. C. 394; *Macaulay* v. *Philips*, 4 Ves. 15; *Baldwin* v. *Baldwin*, 5 De G. & Sm. 319.

[4] *Lloyd* v. *Mason*, 5 Ha. 153.

[5] *Murray* v. *Elibank*, 1 L. C. 392.

[6] *Bonner* v. *Bonner*, 17 Beav. 86. *Barnard* v. *Ford*, L. R. 4 Ch. 247.

By an adequate settlement.

3. Where an adequate settlement has been made upon her;[1] but not by an inadequate settlement, unless it be by an express stipulation before marriage.[2]

Her adultery and desertion of the husband. She does not lose it, where both are living in adultery.

4. Where she is living in adultery apart from her husband;[3] but even then, her husband will not, it seems, while he does not maintain her, be entitled to receive the whole of her property.[4] But where both husband and wife are living in adultery, it has been held that the wife may claim a settlement.[5]

By her fraud.

5. By her fraudulent suppression of the fact of her coverture. Thus, where a woman, by a document purporting to bear date before, but in reality signed after, her marriage, affected to assign certain property to her husband, which he afterwards sold, it was held that, though there was evidence of coercion on the part of the husband, yet by her concurrence, she had precluded herself from claiming her equity to a settlement as against the purchaser.[6]

Amount of settlement.

If husband refuse, so long as he maintains her he takes income.

Amount depends on circumstances.

When the husband is solvent, the amount to be settled upon the wife and children is a matter which depends generally on the arrangement between the husband and wife, and if the husband refuse to make a settlement upon his wife, the court will not, so long as he supports her, prevent his taking the produce or interest of her property, retaining, however, the capital, so as to give the wife a chance of taking it by survivorship.[7] The question as to what amount should be settled upon the wife arises most frequently when the husband has become bankrupt. No general

[1] *In re Erskine's Trusts*, 1 K. & J. 302; *Spicer* v. *Spicer*, 24 Beav. 365.

[2] *Salway* v. *Salway*, Amb. 692; *Garforth* v. *Bradley*, 2 Ves. Sr. 675.

[3] *Carr* v. *Eastabrooke*, 4 Ves. 146; *In re Lewin's Trust*, 20 Beav. 378.

[4] *Ball* v. *Montgomery*, 2 Ves. Jr. 191.

[5] *Greedy* v. *Lavender*, 13 Beav. 62.

[6] *In re Lush's Trusts*, L. R. 4 Ch. 591.

[7] *Sleech* v. *Thorington*, 2 Ves. Sr. 561; *Atcheson* v. *Atcheson*, 11 Beav. 485.

rule can be laid down. It is a matter purely within the discretion of the court, to be determined according to the circumstances and merits of the case.[1] The court will take into consideration whether the wife has acquired any benefit out of the property of her husband;[2] the conduct and circumstances of the husband;[3] or the conduct of the wife;[4] whether she is living in adultery, or has through her own misconduct separated from the husband.

Previous benefits from husband's property. Conduct of both.

The rule in general, in the absence of special circumstances, is that one-half of the wife's property shall be settled upon herself, and the remaining moiety go to her husband or his assignees.[5]

Generally half is settled on her.

And in some cases, it has been held that the *whole* fund will be settled on her; as where it is small, and barely sufficient for the maintenance of the wife and children;[6] where the husband having become bankrupt is not able to maintain his wife;[7] or where the husband has deserted or behaved cruelly to his wife, and does not maintain her.[8]

Sometimes the whole fund will be settled.

Since the extent of the wife's equity is, to have a settlement made for the benefit of herself and her children, the court will not interfere with the marital right further than is necessary to give effect to that equity. The ultimate limitation, therefore, in default of issue of the marriage, will be to the husband absolutely.[9]

Form of settlement.

[1] *Carter* v. *Taggart*, 1 De G. M. & G. 289; *Aubrey* v. *Brown*, 4 W. R. 425.

[2] *In re Erskine's Trusts*, 1 K. & J. 302; *Green* v. *Otte*, 1 Sim. & Stu. 250.

[3] *Marshall* v. *Fowler*, 16 Beav. 249; *Barrow* v. *Barrow*, 18 Beav. 529.

[4] *Barrow* v. *Barrow*, 5 De G. M. & G. 795; *Ball* v. *Coutts*, 1 Ves. & B. 302, 304.

[5] *Dunkley* v. *Dunkley*, 2 De G. M. & G. 396; *In re Suggitt's Trusts*, L. R. 3 Ch. 215.

[6] *In re Kincaid's Trusts*, 1 Drew. 326.

[7] *Scott* v. *Spashett*, 3 Mac. & G. 599; *Gardner* v. *Marshall*, 14 Sim. 575.

[8] *Dunkley* v. *Dunkley*, 2 De G. M. & G. 390; *re Ford*, 32 Beav. 621.

[9] *Croxton* v. *May*, L. R. 9 Eq. 404.

How far binding as against creditors of husband.

As to the question, how far settlements made in consideration of the wife's equity to a settlement will be binding as against creditors, the following rules may be laid down:—

If husband reduce her property into possession, and then make a settlement, it must conform to 13 Eliz., c. 5.

Valid if *bonâ fide*, though on a meritorious consideration.

1. Where the husband has once reduced into possession, the equitable choses in action of his wife, and then makes a voluntary settlement on his wife, out of them, the question of the validity, or invalidity of such settlement against creditors, will depend upon the *bona fides* of the transaction. If, therefore, the husband, largely indebted at the time, convey property in trust for his wife and children, such a conveyance may be within the stat. 13 Eliz., c. 5, and void against the creditors.[1] But as that statute only directs that no act whatsoever, done to *defraud* a creditor, shall be of any effect against that creditor, a *bonâ fide* settlement, where there is no imagination of fraud, even though voluntary,[2] will be supported as against creditors.[3] By the Bankruptcy Act 1869, it is enacted, that "a settlement made (by a trader), on or for the wife or children of the settlor, of property, which has accrued to the settlor after marriage in right of his wife," shall be good as against his assignees in bankruptcy (Sect. 91).

Trader's settlement of wife's property under Bankruptcy Act 1869.

If court decree the settlement, creditors are bound.

2. Where the court decrees a settlement upon the wife, "the court will support it as a good settlement for valuable consideration."[4]

Settlement by husband, on trustees' refusing to part with the wife's property, also good.

3. Where the wife, after marriage, becomes entitled to property which the husband cannot touch without the aid of the court, and the trustees will not pay it without the husband making a settlement; and if

1 *Goldsmith* v. *Russell*, 5 De G. M. & G. 547.

2 *Holmes* v. *Penney*, 3 K & J. 90; *Sagitary* v. *Hide*, 2 Vern. 43.

3 *Cadogan* v. *Kennett*, Cowp. 434; see *ante*, page 64.

4 *Wheeler* v. *Caryl*, Amb. 121; *Simson* v. *Jones*, 2 Russ. & My. 365.

the husband agrees to settle it, and do that which the court would decree, it is a good settlement against creditors.[1]

[1] *Wheeler* v. *Caryl*, Amb. 121, 122; *Moor* v. *Rycault* Prec. Ch. 22; *In re Wray's Trusts*, 16 Jur. 1126.

CHAPTER IV.

SETTLEMENTS IN DEROGATION OF MARITAL RIGHTS.

Wife must not commit a fraud on the marital right.

It being a general rule of law and equity that a husband becomes entitled to the property of his wife on marriage, any alienation of property by her in fraudulent derogation of the marital right will in equity be deemed null and void. In *Strathmore* v. *Bowes*,[1] Lord Thurlow thus states the rule,—"A conveyance by a wife, whatsoever may be the circumstances, and even the moment before the marriage, is *primâ facie* good, and becomes bad only upon the imputation of fraud. If a woman, *during the course of a treaty* of marriage with her, makes, without notice to the intended husband, a conveyance of any part of her property, I should set it aside, though good *primâ facie*, because affected with that fraud."

Conveyance by wife *primâ facie* good.

The cases decided on this subject support the following conclusions :—

1. If during a treaty of marriage she alienes without husband's knowledge, property to which she has represented herself entitled, it is fraudulent.

1. If a woman entitled to property enters into a treaty for marriage, and *during the treaty represents to her intended husband* that she is so entitled; that upon the marriage he will become entitled *jure mariti;* and if *during the same treaty* she clandestinely conveys away the same property to a volunteer,[2] or settles the property upon herself, in such a manner as to defeat his marital right, and the concealment continues until the marriage takes place, there can be no doubt but

[1] 1 L. C. 371.

[2] *Lance* v. *Norman*, 2 Ch. Rep. 79.

that a fraud is thus practised on the husband, and he is entitled to relief.[1]

Same principle applicable if he did not know her to be possessed of such property.

2. And not only is this principle applicable where the husband knew of the existence of her property, but it has been extended much further; for in *Goddard* v. *Snow*,[2] a woman ten months before marriage, but after the commencement of that intimate acquaintance with her future husband which ended in marriage, made a settlement of a sum of money *which he did not know her to be possessed of*. The marriage took place, she concealing from him both her right to the money, and the existence of the settlement. Ten years after, on her death, it was held on a bill filed by the husband, that the settlement was void, as a fraud upon his marital right.[3]

Not fraudulent, if to a purchaser for valuable consideration without notice.

3. But when a woman about to marry, sells or conveys to a purchaser for valuable consideration, *without notice* of any intended derogation of the marital right, the sale or conveyance will be held good.[4] It seems uncertain, however, whether, if the purchaser for value *have notice*, the sale or conveyance will stand as against the husband.[5]

Void, even though meritorious, if secret.

4. It would seem that a clandestine settlement made by a woman pending her marriage, even if meritorious in its nature, as on the children of a former marriage, will be set aside as a fraud on the husband.[6]

Marriage with

5. If the intended husband is acquainted before his

[1] *England* v. *Downs*, 2 Beav. 528.
[2] 1 Russ. 485.
[3] *Downes* v. *Jennings*, 32 Beav. 290; *Taylor* v. *Pugh*, 1 Hare, 608.
[4] *Blanchet* v. *Foster*, 2 Ves. Sr. 264; *Llewellin* v. *Cobbold*, 1 Sm. & Giff. 376.
[5] Ibid.
[6] *Taylor* v. *Pugh*, 1 Hare, 608.

notice of settlement binds husband.

marriage with the fact of an assignment of property made by his intended wife, and nevertheless thinks fit afterwards to marry her, he will be bound by it.[1]

6. A husband can only set aside a conveyance when made pending the marriage with *him.*

6. In all the cases it has been held that the settlement to be invalidated must have been made without the husband's knowledge, *during the course of the treaty for marriage with him.* It has been accordingly held that a settlement made by a widow upon herself and the children of a former marriage was not fraudulent, because it was not proved that the person she afterwards married was at the time of the settlement "her then intended husband."[2] And in *Strathmore* v. *Bowes*,[3] a woman, pending a treaty of marriage with A., made a settlement of her property with his approbation; a few days after, B., by stratagem, induced her to marry him; B. had no notice of the settlement. It was, however, held good against him.

He must be her then intended husband.

7. If he has seduced her before marriage her conveyance is good as against him.

7. Where the husband has before marriage seduced his wife, and thus rendered retirement from the marriage on her part impossible, a settlement made by her of her property without his knowledge will, it seems, be supported.[4]

[1] *St George* v. *Wake*, 1 My. & K. 610; *Wrigley* v. *Swainson*, 3 De G. & Sm. 458; *Slocombe* v. *Glubb*, 2 Bro. C. C. 545; but see *Nelson* v. *Stocker*, 4 De G. & Jo. 458.

[2] *England* v. *Downs*, 2 Beav. 531.

[3] 1 L. C. 364.

[4] *Taylor* v. *Pugh*, 1 Hare, 608.

CHAPTER V.

INFANTS.

Who may be the guardians of an infant. Guardians.

1. It is indisputable that the father is by nature and nurture the guardian of his children during their infancy.[1] 1. Father.

2. By 12 Car. II., c. 24, a power was conferred upon the father of appointing, even though a minor, by deed or will, a guardian for his legitimate children; these are termed testamentary guardians. But by the Wills Act,[2] the power of making a will is taken from minors, who can therefore, it seems, now only appoint guardians for their children by deed. 2. Testamentary guardian.

A testamentary guardian is a trustee, and the Statute of Limitations is inapplicable to accounts as between him and his ward.[3]

3. The father may waive his natural rights of guardianship in favour of a stranger, whom he has permitted to put himself in *loco parentis* towards his child. Where, therefore, under these circumstances, the stranger has provided for the maintenance and education of the child, and has appointed guardians, the father will be restrained in equity from asserting his parental rights to the prejudice of his child's future interests.[4] 3. Guardian appointed by stranger standing *in loco parentis*.

[1] *Wellesley* v. *Beaufort*, 2 Russ. 21.

[2] 1 Vict. 26.

[3] *Matthews* v. *Brise*, 14 Beav. 341.

[4] *Powel* v. *Cleaver*, 2 Bro. C. C. 499.

4. Guardian appointed by court.

4. Guardian by appointment of the court. The origin of the jurisdiction of the Court of Chancery over infants has been a matter of much juridical discussion. The better opinion seems to be, that this jurisdiction has its just and rightful foundation in the prerogative of the Crown, flowing from its general power and duty as *parens patriae*, to protect those who have no other lawful protector.[1] Partaking as it does, more of the nature of a judicial administration of rights and duties, *in foro conscientiae*, than of strict executive authority, it would naturally follow, *eâ ratione*, that it should be exercised in the Court of Chancery, as a branch of the *general jurisdiction* originally confided and delegated to it. Hence it is that this jurisdiction does not belong to the Lord Chancellor alone, as holder of the Great Seal and Keeper of the Royal conscience, but may be exercised by the Master of the Rolls also; and as in other cases where the Court of Chancery has a general jurisdiction, an appeal lies to the House of Lords from the decision of the Court of Chancery.[2]

Jurisdiction from Crown as *parens patriae*.

Delegated to the Court of Chancery.

Infant becomes a ward of court when bill is filed relative to his estate.

Or on order made without suit.

If a bill be filed relative to an infant's estate or person the court acquires jurisdiction, and the infant, whether plaintiff or defendant, and even during the life of its father, or a testamentary guardian, immediately becomes a ward of the court.[3] And where without suit an order for maintenance had been made on summons in Chambers, it was held that the infant thereby became a ward of court.[4]

Infant must have property, that court may exercise its jurisdiction.

The Court of Chancery will appoint a suitable guardian to an infant where there is none other, or none other who will or can act; but, as a general rule, it will not do so unless where the infant has property. "It

[1] St. 1333; *De Manneville* v. *De Manneville*, 10 Ves. 63.
[2] St. 1335.
[3] *Butler* v. *Freeman*, Amb. 303.
[4] *In re Graham*, L. R. 10 Eq. 530; *In re Hodges Settlement*, 3 K. and J. 213.

is not, however," as observed by Lord Eldon, "from any want of jurisdiction that it does not act where it has no property of an infant, but from a want of the means to exercise its jurisdiction, because the court cannot take on itself the maintenance of all the children in the kingdom. It can exercise this jurisdiction usefully and practically only where it has the means of doing so,—that is to say, by its having the means of applying property for the use and maintenance of the infant."[1]

Jurisdiction over guardians.

In general, parents are intrusted with the custody and education of their children, on the natural presumption that the children will be properly treated, and that due care will be taken of them in regard to their education, morals, and religion; but if the court has reasonable ground to believe that the children would not be properly treated, it "would interfere, upon the principle that *preventing* justice was preferable to *punishing* justice."[2] Accordingly, where the father is insolvent,[3] or his character and conduct are such as are likely to contaminate the morals of his children,[4] or where he is endangering their property or neglecting their education,[5] or is guilty of ill-treatment and cruelty to them,[6] the custody of the children will be committed to a person to act as guardian.[7]

When father loses his guardianship.

Guardian selects mode and place of education of his ward.

The guardian will be allowed to regulate the mode and select the place for the education of his ward, whose obedience will be enforced by the court.[8] And

[1] *Wellesley* v. *Beaufort*, 2 Russ. 21.
[2] Ibid.
[3] *Kiffin* v. *Kiffin*, 1 P. W. 705.
[4] *Shelley* v. *Westbrooke*, Jac. 266 *n.*
[5] *Creuze* v. *Hunter*, 2 Cox, 242.
[6] *Whitfield* v. *Hales*, 12 Ves. 492.
[7] *Ex parte Mountford*, 15 Ves. 445.
[8] *Hall* v. *Hall*, 3 Atk. 721. See *Tremain's Case*, 1 Str. 167, where, "being an infant, he went to Oxford, contrary to the orders of his guardian, who would have him go to Cambridge, and the court sent a messenger to carry him from Oxford to Cambridge; and upon returning to Oxford, there went another, *tam* to carry him to Cambridge, *quam* to keep him there."

the court will aid guardians in obtaining possession of the persons of their wards when they are detained from them.[1]

When guardian gives security.

If the guardian wishes to take his ward out of the jurisdiction of the court, and in some other cases where there is danger of injury to the ward's person or property, the court will always take security from the guardian.[2]

Guardians must not change character of ward's property.

Guardians will not ordinarily be permitted to change the personal property of an infant into real property, or the real property into personalty. And this rule is founded on two considerations—such a conversion may not only affect the rights of the infant himself, but also of his representatives if he should die under age; for it must be remembered that, before the passing of the Wills Act,[3] an infant might dispose of personal property before he attained the age of twenty-one, but could not devise real property until he had attained that age.[4] But guardians may, under peculiar circumstances, where it is manifestly for the benefit of the infant, change the nature of the estate; as for necessary expenses, such as repairs,[5] or by payment of a certain sum out of the personal estate of the infant, in pursuance of a condition imposed on a devise of an estate to him;[6] and the court will support their conduct if the act be such as the court would itself have done, under the like circumstances, by its own order.[7] The act of the guardian in such a case must not be wantonly done, but must be for the manifest interest and convenience of the infant. It is true that

Except where necessary for his benefit.

[1] St. 1340.

[2] *Jeffreys* v. *Vanteswarstwarth*, Barn. Ch. R. 141; *Biggs* v. *Terry*, 1 My. & Cr. 675.

[3] 1 Vict., c. 26.

[4] *Ex parte Phillips*, 19 Ves. 122; *Sergeson* v. *Seeley*, 2 Atk. 413; *Ware* v. *Polhill*, 11 Ves. 278.

[5] *Ex parte Grimstone*, 4 Bro. C. C. note, 235; Amb. 708.

[6] *Vernon* v. *Vernon*, cited 1 Ves. Jr. 456.

[7] *Ex parte Phillips*, 19 Ves. 122.

it has been said there is no equity in such a case between the representatives of the infant. But, nevertheless, the court has an obvious regard to the circumstance that these representatives may be affected thereby, and it is always inclined to keep a strict hand over guardians, in order to prevent partiality and misconduct. For the purpose of preventing any such acts of the guardian, in cases of the death of the infant before he arrives of age, from changing improperly the rights of the parties, who, as heirs or distributees, would otherwise be entitled to the property, it is the constant rule of courts of equity to hold lands purchased by the guardian with the infant's personal estate, or with the rents and profits of his real estate, to be personalty, and distributable as such; and, on the other hand, to treat real property turned into money (as, for example, timber cut down on an infant's fee simple estate) as still retaining its original character of real estate. And when the court directs any such change of property, it directs the new investment to be in trust for the benefit of those who would be entitled to it, if it had remained in its original state.[1]

Representatives who would have taken before the change, still take after the conversion.

In the case of wards of the court, whether male or female, even when they have parents living, or guardians, it is necessary to apply to obtain the permission of the court before their marriage can take place.[2] If a man should marry a female ward without the consent and approbation of the court, he and all others concerned in aiding and abetting the act will be treated as guilty of contempt of court, and may be punished by imprisonment.[3] And it seems that, although the husband, or those contriving and assisting at a marriage are not aware that the infant is a ward of

Marriage of ward of court must be with its permission.

Conniving at marriage of ward without consent of court, a contempt.

[1] St. 1357; *Ware* v. *Polhill*, 11 Ves. 278.

[2] *Smith* v. *Smith*, 3 Atk. 305.

[3] *Wortham* v. *Pemberton*, 1 De G. & Sm. 644; *Ex parte Mitchell*, 2 Atk. 173.

court, their ignorance will not be sufficient to acquit them of contempt of court.[1]

Guardian must give recognisance that ward shall not marry without consent.

With a view also to prevent the improper marriages of its wards, the guardian on his appointment is generally required to give a recognisance that the infant shall not marry without the leave of the court; so that, if an infant should marry, though without the privity, knowledge, or negligence of the guardian, yet the recognisance would in strictness be forfeited, whatever favour the court might, upon an application, think fit to extend to the party when he should appear to have been in no fault.[2]

Improper marriage restrained by injunction.

With the same view, the court will, where there is reason to suspect an intended and improper marriage without its sanction, by an injunction, not only interdict the marriage, but also interdict communications between the ward and the admirer,[3] and if the guardian is suspected of any connivance, it will remove the infant from his care and custody, and commit the ward to the care of others.[4]

Settlement must be approved by court.

In case of an offer of marriage of a ward, the court will generally refer it to chambers, to ascertain and report whether the match is a suitable one, and also what settlement ought to be made.[5]

When the marriage has been actually celebrated without the sanction of the court, the court will not discharge the husband, who has been committed for contempt, until he has made such a settlement upon the female ward, as upon a reference to chambers,

[1] *More* v. *More*, 2 Atk. 157; *Herbert's Case*, 3 P. W. 116.
[2] *Eyre* v. *Countess of Shaftesbury*, 2 L. C. 596.
[3] *Lord Raymond's Case*, Cas. t. Talb. 58; *Pearce* v. *Crutchfield*, 14 Ves. 206.
[4] *Tombes* v. *Elers*, Dick, 88.
[5] *Smith* v. *Smith*, 3 Atk. 305; *Leeds* v. *Barnardeston*, 4 Sim. 538; St. 1361.

shall, under all the circumstances, be equitable and proper. The nature of the settlement will depend in a great measure upon the fortune, position, and conduct of the husband, whether the parties are of equal rank and fortune, or the husband is in such a position as would lead to a suspicion of mercenary motives for the marriage on his part.[1]

Considerations on a settlement.

Under the Marriage Act, 4 Geo. IV., c. 67, the guardian of any minor, who has married without his consent, may, on information filed, obtain a declaration of forfeiture against either party, who has procured the solemnisation of the marriage by falsely stating that such consent had been given, and the court will thereupon decree a settlement on the innocent party or the issue of the marriage.[2]

Settlement under Marriage Act, 4 Geo. IV., c. 67.

By 18 & 19 Vict., c. 43 (explained by 23 & 24 Vict., c. 83), infants are now enabled, with the approbation of the Court of Chancery, to make binding settlements on marriage, of their real and personal estate, whether in possession, reversion, remainder, or expectancy.[3]

Binding settlements by infants, under 18 & 19 Vict., c. 43.

It will not make any difference in the case, that the ward has since arrived of age, or is ready to waive her right to a settlement; for the court will protect her against her own indiscretion, and the undue influence of her husband.[4]

Waiver by ward of her settlement.

A father is bound to maintain his children, and will not usually have any allowance out of their property for that purpose, notwithstanding there is a provision

Father bound to maintain his children, though there

[1] *Ball* v. *Coutts*, 1 V. & B. 303; *Field* v. *Moore*, 7 De G. M. & G. 691.

[2] See 19 & 20 Vict., c. 119, s. 19; *Att.-Gen.* v. *Read*, L. R. 12 Eq. 38; Dan. Ch. Pr. 10-12.

[3] *Re Olive*, 11 W. R. 819; *Barrow* v. *Barrow*, 4 K. & J. 418; *Simson* v. *Jones*, 2 Russ. & My. 365.

[4] St. 1361; *Hobson* v. *Ferraby*, 2 Coll. 412; *Long* v. *Long*, 2 Sim. & St. 119.

is a provision for maintenance. Except when he is prevented by poverty. A wife liable under 33 & 34 Vict., c. 93.

for their maintenance;[1] but where the father is in such circumstances of poverty as not to be able to give a child an education suitable to the fortune which he expects, maintenance will be allowed.[2] A wife was formerly under no legal obligation to maintain her children.[3] But now, by the Married Women's Property Act 1870 (33 & 34 Vict., c. 93, s. 14), if possessed of separate property, she is liable to contribute to their maintenance.

When father is entitled to an allowance.

If there is a contract on marriage amounting to a trust, that property shall be applied for the maintenance and education of the children, the property must be applied without reference to the ability of the father to maintain and educate him.[4]

How allowance is regulated.

In allowing maintenance for an infant, regard will be had to the state and condition of his family. Thus, where there are younger children, especially if they are numerous and totally destitute, the court will make a liberal allowance to the eldest son, that he may be the better able to maintain his brothers and sisters.[5] And a liberal allowance will also be made for infants, in order to relieve their parents when in distressed circumstances."[6]

[1] *Stocken* v. *Stocken*, 4 My. & Cr. 98; *Meacher* v. *Young*, 2 My. & K. 490. See also *Ransome* v. *Burgess*, L. R. 3 Eq. 773.

[2] *Buckworth* v. *Buckworth*, 1 Cox. 81.

[3] *Hodgens* v. *Hodgens*, 4 C. & F. 323.

[4] *Thompson* v. *Griffin*, 1 Cr. & Ph. 317, 320.

[5] *Pierpoint* v. *Cheney*, 1 P. Wms. 488; *Bradshaw* v. *Bradshaw*, 1 J. & W. 647.

[6] *Heysham* v. *Heysham*, 1 Cox, 179.

CHAPTER VI.

OF PERSONS OF UNSOUND MIND.

Jurisdiction from Crown as *parens patriae*.

THE Court of Chancery may properly be deemed to have had, originally, as the general delegate of the Crown, as *parens patriae*, the right to have the custody of idiots and lunatics who had no other guardian. But the stats. 17 Ed. II., cc. 9, 10, introduced certain new rights, powers, and duties of the Crown; and since that period, the jurisdiction has become somewhat mixed in practice; but it is principally in modern times exerted under these statutes. The jurisdiction is, therefore, now usually treated as a special jurisdiction for many purposes, derived from the special authority of the Crown, under its sign-manual to the Chancellor personally, and not as belonging to him as Chancellor, sitting in the Court of Chancery.[1]

Chancellor has jurisdiction under warrant under sign-manual.

Chancellor has also jurisdiction as chief of the Court of Chancery.

But whatever may be the true origin of the authority of the Crown as to idiots and lunatics, it is clear that the Chancellor does not in all cases act under the special warrant by the sign-manual. The warrant gives to the Chancellor the right of providing for the maintenance of idiots and lunatics, and for the care of their persons and estates, and no more. When a person is ascertained to be an idiot or lunatic, the Chancellor proceeds, under his special warrant, to commit the custody of the person and estate of the idiot or lunatic to the proper guardians, and to direct for him a suitable maintenance. After the custody is so granted, and maintenance is assigned, the Chancellor acts in other matters, relative to lunatics at least, not under the warrant by the sign-manual, but

[1] St. 1363.

in virtue of his general power, as holding the Great Seal, and as Keeper of the King's conscience. The Court of Chancery is in the habit of making many orders, and enforcing them by attachment; which orders, and the manner of enforcing them, are not warranted by the sign-manual, but are exercised under the general power of the court.[1] Yet the Chancellor does not act as an equity judge, as administering the general powers of a court of equity, when he makes these orders and enforces them by attachment; for then an appeal would lie to the House of Lords; whereas, although from a decree made on a bill filed relating to a lunatic's estate in the regular course of chancery proceedings, an appeal lies to the House of Lords, yet an appeal from an order made on motion or petition in Lunacy, lies to the Judicial Committee of the Privy Council.[2]

Appeal to Privy Council.

Lords Justices have jurisdiction.

The jurisdiction in lunacy has been regulated and defined by a series of statutes.[3] By the principal act, the Lunacy Regulation Act 1853, jurisdiction in lunacy has been given to the Lords Justices of the Court of Appeal in Chancery.

Jurisdiction extends to persons incapable of managing their own affairs.

The jurisdiction extends not only to idiots and lunatics, properly so called, but also to all persons, who, from age or misfortune, are incapable of managing their own affairs, and therefore are properly deemed of unsound mind, or *non compotes mentis*.[4] And a commission of lunacy may issue where the lunatic has property within this country, although he is domiciled abroad.[5]

Conversion of lunatic's estate.

In the case of a lunatic, the court will not generally alter the state of the lunatic's property so as to affect the rights of his representatives, unless where it is for

[1] St. 1364.
[2] Sm. Man. 430.
[3] 16 & 17 Vict., c. 70; 18 Vict., c. 13; 25 & 26 Vict., c. 86.
[4] St. 1365.
[5] St. 1365. *a*.

the benefit of the lunatic himself. "The general object of the attention of the administration is solely and entirely the interest of the lunatic himself, without looking to the interests of those who upon his death may have an eventual right of succession. Accordingly in such a case, where the conversion is made by the direction of a court of competent jurisdiction in Lunacy, as there are no equities between the heir and the next of kin, they will take the properties to which they are respectively entitled, according to the character in which they find them."[1]

His interest alone consulted.

His representatives have no equities between them.

They take the fund in the character in which it is actually found.

[1] *Oxendon* v. *Compton*, 2 Ves. Jr. 72; *Ex parte Phillips*, 19 Ves. 118; *Re Leeming*, 7 Jur. N. S. 115; 3 De G. F. & Jo. 43; *In re Wharton*, 5 De G. M. & G. 33; 16 & 17 Vict., c. 70, s. 119.

PART IV.

CONCURRENT JURISDICTION.

Origin of concurrent jurisdiction.

THE concurrent jurisdiction of courts of equity has its true origin in one of two sources: either the courts of law, although they have a general jurisdiction in the matter, cannot or could not give adequate, specific, or perfect relief, or, under the actual circumstances of the case, they cannot or could not give relief at all. The former occurs in all cases when a simple judgment for the plaintiff or for the defendant does not meet the full merits and exigencies of the case, but a variety of adjustments, limitations, and cross claims are to be introduced and acted on; and a decree meeting all the circumstances of the particular case between the very parties is indispensable to complete distributive justice. The latter occurs when the object sought, though treated as generally falling within a class of right cognisable by courts of law, is in the special instance, from special circumstances, or from the weakness of the common law, out of the pale of its jurisdiction; as, for instance, a perpetual injunction, or a preventive process, to restrain trespasses, nuisances, waste. It may, therefore, be said that the concurrent jurisdiction of equity extends to all cases of legal rights, where, under the circumstances, there is not a plain, adequate, and complete remedy at law.[1]

Concurrent jurisdiction extends to cases where there is not a plain, adequate, and complete remedy at law.

[1] St. 76.

The subject may be divided into two branches :— Division of the subject.

I. That in which the subject-matter constitutes the principal ground of the jurisdiction, as in cases of accident, mistake, or fraud.

II. That in which the peculiar remedies afforded by courts of equity constitute the principal ground of the jurisdiction, under which will fall suretyship, partnership, questions of account and set-off, specific performance, injunction, partition, and interpleader.

CHAPTER I.

ACCIDENT.

Accident.

By the term accident is intended, not merely inevitable casualty, or the act of Providence, or what is technically called *vis major*, or irresistible force, but such unforeseen events, misfortunes, losses, acts, or omissions as are not the result of any negligence or misconduct in the party.[1]

To give equity jurisdiction, there must be no complete legal remedy, and the party must have a conscientious title to relief.

But this general definition must not be taken as covering every case of accident to which it may apply; it is not every case of accident which will justify the interposition of a court of equity.[2] The jurisdiction being concurrent, will be maintained only, *first*, when a court of law cannot grant suitable relief; and *secondly*, when the party has a conscientious title to relief. Both circumstances must concur in any case to constitute a ground on which relief in equity may be craved. For it is certain that in some cases of accidents, courts of law can and always could afford adequate relief, as in cases of "loss of deeds, mistakes in receipts and payments, wrong payments, deaths which make it impossible to perform a condition literally, and a multitude of other contingencies."[3]

Is there an adequate remedy at law?

The first consideration, then, is whether there is an adequate remedy at law? not merely whether there is some remedy at law; and here a most material distinction is to be attended to. In modern times, courts of law frequently interfere and grant a remedy,

[1] St. 78.
[2] *Whitfield* v. *Fausset*, 1 Ves. Sr. 392.
[3] 3 Bl. Com. 431; St. 79.

under circumstances in which it would certainly have been denied in earlier periods; and sometimes the Legislature, by express enactments, has conferred on courts of law the same remedial faculty which belongs to courts of equity. With reference to either of these cases, it is a fixed rule that, if the courts of equity originally obtained and exercised jurisdiction over a particular subject-matter, that jurisdiction cannot be in any way affected, merely by the circumstance, that the common law-courts have usurped or had conferred upon them, a power to deal with such subject-matter, similar to that exercised by courts of equity. "It does not follow, because the court of law will give relief, that this court loses the concurrent jurisdiction which it always had."[1]

Courts of equity do not lose their jurisdiction because the common law courts have subsequently acquired it also.

One of the most common interpositions of equity under this head is in the case of lost bonds, or other instruments under seal. Until a very recent period, the doctrine prevailed that there could be no remedy on a lost bond in a court of common law, because there could be no *profert* or production of the instrument in court, in order that the defendant might demand *oyer* of it—that is, that it should be read in open court.[2] At present, however, the courts of law do entertain the jurisdiction, and dispense with the *profert*, if an allegation of loss, by time and accident, is stated in the declaration.[3] But this circumstance is not permitted in the slightest degree to change the course in equity.[4]

Lost bonds.

The original ground, therefore, of granting the relief was the supposed inadequacy of a court of law

Originally no remedy at law.

[1] *Atkinson* v. *Leonard*, 3 Bro. C. C. 222; *British Empire Shipping Co.* v. *Somes*, 3 K. & J. 437; St. 80.

[2] The old practice of *profert* and *oyer* is abolished by the C. L. P. Act of 1852, s. 55. *Walmsley* v. *Child*, 1 Ves. Sr. 344.

[3] *Read* v. *Brookman*, 3 T. R. 151; *Duffield* v. *Elwes*, 1 Bligh, N. S. 543.

[4] St. 81; *Kemp* v. *Pryor*, 7 Ves. 249, 250.

to afford it in a suitable manner, from the impossibility of making a *profert;* but, independently of this ground for the original interference of equity, there is another satisfactory reason for the continuance of that interference, notwithstanding that courts of common law have jurisdiction over the subject-matter. A court of equity alone can give a complete remedy, with all the fit limitations which justice requires, by granting relief only upon the condition that the plaintiff who seeks its aid shall give, if necessary, a suitable bond of indemnity. Now a court of law is incompetent to require such a bond of indemnity as a part of its judgment, although it has sometimes attempted an analogous relief by requiring the previous offer of such an indemnity. But such an offer may in many cases fall far short of the just relief; for in the intermediate time there may be a great change in the circumstances of the parties to the bond of indemnity.[1]

Equity can grant relief by requiring an indemnity, which a court of law cannot do.

Thus, in *The East India Co.* v. *Boddam*,[2] Lord Eldon says, "How can a court of law contrive an indemnity? In a case before me in the Court of Common Pleas, the declaration was upon a lost bill of exchange. The plaintiff in the action proves that he offered to indemnify. Suppose he proves that he proposed the security of a man, in the highest credit at that time, but who became a bankrupt an hour afterwards. Is that an indemnity?"[3]

Where discovery is sought, no affidavit necessary, unless relief also is asked.

There is an important distinction as to the procedure between cases where a plaintiff, alleging the loss of a bond, seeks discovery merely, and cases where he prays for relief as well as discovery. Where discovery only, and not relief, is the object of the bill, there equity will grant the discovery without any affidavit of loss or offer of indemnity; but equity will

[1] St. 82.
[2] 9 Ves. 467.
[3] *Ex parte Greenway*, 6 Ves. 812.

entertain a suit for relief, as well as for discovery, only upon the party making an affidavit of loss of the instrument, and offering indemnity.

The ground of this distinction is that, when relief is prayed, the proper forum of jurisdiction is sought to be changed from law to equity; and in all such cases an affidavit ought to be required, to prevent abuse of the process of the court. But when discovery only is sought, the original jurisdiction remains at law, and equity is merely auxiliary. The jurisdiction for discovery alone would therefore seem, upon principle, to be universal. But the jurisdiction for relief is special, and limited to peculiar cases; and in all these cases there must be an affidavit of the loss, and, when proper, an offer of indemnity also, in the bill.[1]

Loss of deed alone is not sufficient ground for coming into equity. For the law now gives relief.

But the loss of a deed is not always a ground to come into a court of equity for relief; for if there is no more in the case, although the party may be entitled to a discovery of the original existence and validity of the deed, courts of law may afford just relief, since they will admit evidence of the loss and contents of a deed, just as a court of equity will do.[2] To enable the party, therefore, in case of a lost deed, to come into equity for relief, he must establish that there is no remedy at all at law, or no remedy which is adequate, and adapted to the circumstances of the case. Thus, he may come into equity when a title-deed of land has been destroyed, or is concealed by the defendant; for then, as the party cannot know which alternative is correct, a court of equity will make a decree, which a court of law cannot, that the plaintiff shall hold and enjoy the land until the defendant shall produce the deed or admit its destruction.[3] So, if a deed concerning land

There must be special circumstances irremediable at law.

Title-deed of land concealed by defendant.

Deed lost

[1] *Walmsley* v. *Child*, 1 Ves. Sr. 344, St. 83.

[2] *Whitfield* v. *Fausset*, 1 Ves. Sr. 392.

[3] Ibid.

when party in possession prays to be established in possession.

is lost, and the party in possession prays discovery, and to be established in his possession under it, equity will relieve, for no remedy in such a case lies at law.[1]

Where plaintiff is out of possession.

And where the plaintiff is out of possession, there are cases in which equity will interfere upon lost or suppressed title-deeds, and decree possession to the plaintiff; but in all such cases there must be other equities calling for the action of the court.[2] Indeed, the bill must always lay some ground besides the mere loss of a title-deed, or other sealed instrument, to justify a prayer for relief—as that the loss obstructs the right of the plaintiff at law, or leaves him exposed to undue perils in the future assertion of such right.[3]

Lost negotiable instruments.

With reference to lost bills of exchange and other negotiable instruments, it was, after some conflict of authority, decided, that if a bill, note, or cheque, negotiable either by endorsement or by delivery only,

No remedy originally at law.

were lost, no action would lie at the suit of the loser against any one of the parties to the instrument, either on the bill or note itself, or on the consideration;[4] and the law was the same though the bill had never been indorsed.[5] In this case, therefore, the proper remedy was in equity, not only on the ground of there being no remedy at law, but also on account of the power equity possesses of compelling the plaintiff to give a proper indemnity to the defendant.[6] And the jurisdiction of equity over cases of lost bills is not

17 & 18 Vict., c. 125, gives courts of law jurisdiction.

taken away by the 17 & 18 Vict., c. 125, s. 87, which enacts, that in case of any action founded upon a bill of exchange or other negotiable instrument, the court of common law has power to order that the loss of such instrument shall not be set up, provided an indemnity is given to the satisfaction of the court against the

[1] *Dalston* v. *Coatsworth*, 1 P. Wms, 731.
[2] *Dormer* v. *Fortescue*, 3 Atk. 132.
[3] St. 84.
[4] *Hansard* v. *Robinson*, 7 B. & C. 90; *Crowe* v. *Clay*, 9 Exch. 604.
[5] *Ramuz* v. *Crowe*, 1 Exch. 167.
[6] St. 85.

claims of any other person upon such negotiable instrument.[1]

Loss of non-negotiable instrument.

But it would seem that if a bill or note *not negotiable* be lost, an action will lie either, on the bill or on the consideration,[2] for no indemnity would be necessary at law. But in equity such a security may be assigned, and an indemnity would be justly demanded. In these cases, therefore, it appears that equity has concurrent jurisdiction.[3]

Destroyed negotiable instruments.

As to destroyed negotiable instruments the law seems very unsettled. The weight of authority seems to support the conclusion that at common law, by the custom of merchants, the holder, on payment, must deliver up the bill, and cannot recover unless he do so, which he cannot, when the instrument is destroyed.[4] But in a recent case,[5] Wood, V.-C., held that courts of equity have never acquired jurisdiction to give relief on account of the *destruction* of a bill of exchange, because there was a complete remedy in such cases at law. With regard to destroyed non-negotiable instruments it is conceived that the common law can, and always could give, complete relief, and therefore, equity has no jurisdiction in the matter.[6]

Execution of power.

It is an immutable rule that the *non-execution* of a mere power will never be aided in equity.[7] But the rule is different where there is a defective execution of a power resulting either from accident, mistake, or both, and also in regard to agreements to execute powers which may generally be deemed a species of defective execution.[8] Equity will relieve in such cases against the defective execution of a power, but only in favour of persons in a moral sense entitled to the same,

Defective execution remedied.

[1] *The Conflans Company* v. *Parker*, L. R. 3 C. P. 1.
[2] Byles on Bills, 374.
[3] St. 86.
[4] *Hansard* v. *Robinson*, 7 B. & C. 95; Byles on Bills, 373.
[5] *Wright* v. *Maidstone*, 1 K. & J. 708.
[6] Byles on Bills, 372.
[7] *Arundell* v. *Philpot*, 2 Vern. 69; *Bull* v. *Vardy*, 1 Ves. Jr. 272.
[8] Sugd. on Pow. 549.

In whose favour.

and viewed with peculiar favour, and where there are no opposing equities on the other side. The aid of equity, then, will be afforded to a purchaser,[1] which term includes a mortgagee and a lessee;[2] to a creditor;[3] to a wife;[4] to a legitimate child,[5] for wives and children are in some degree considered as creditors by nature;[6] and the like equity has been extended to a charity.[7] But it has been decided that a defective execution will not be aided in favour of the donee of the power, nor a husband,[8] nor of a natural child,[9] nor of a grandchild,[10] nor of remote relations, much less of volunteers.[11]

What defects are aided.

As to the defects which will be aided, they may generally be said to be any which are not of the very essence and substance of the power. Thus, a defect by executing the power by will when it is required to be by deed or other instrument *inter vivos* will be aided.[12] But, on the other hand, if it is required to be executed only by will, and it is executed by an absolute and irrevocable deed, no relief will be granted.[13] Nor will equity aid where the power is executed without the consent of parties who are required to consent to it.[14] But equity will supply such defects as the want of a seal, or of witnesses, or of a signature, or defects in the limitations of the property.[15]

But we must be careful to distinguish between

[1] *Fothergill* v. *Fothergill*, 2 Freem. 257.
[2] *Barker* v. *Hill*, 2 Ch. R. 113; *Reid* v. *Shergold*, 10 Ves. 370.
[3] *Pollard* v. *Greenvil*, 1 Ch. Ca. 10; *Wilkes* v. *Holmes*, 9 Mod. 485.
[4] Cowp. 267; *Clifford* v. *Burlington*, 2 Vern. 379.
[5] *Sarth* v. *Blanfrey*, Gilb. Eq. R. 166; *Sneed* v. *Sneed*, Amb. 64; *Bruce* v. *Bruce*, L. R. 11 Eq. 371.
[6] Barnard. C. C. 107; *Hervey* v. *Hervey*, 1 Atk. 561.
[7] *Innes* v. *Sayer*, 7 Hare, 377; 3 Mac. & G. 606; *Att.-Gen.* v. *Sibthorp*, 2 Russ. & My. 107.
[8] *Watt* v. *Watt*, 3 Ves. 244.
[9] *Tudor* v. *Anson*, 2 Ves. Sr. 582.
[10] *Watts* v. *Bullas*, 1 P. Wms. 60.
[11] *Smith* v. *Ashton*, 1 Freem. 309.
[12] *Tollet* v. *Tollet*, 1 L. C. 207.
[13] *Reid* v. *Shergold*, 10 Ves. 370; *Adney* v. *Field*, Amb. 654.
[14] *Mansell* v. *Mansell*, cited in *Scott* v. *Tyler*, 2 Bro. C. C. 450.
[15] Chance on Powers, 2878, 2879, 2886, 2890. See 1 Vict., c. 26, s. 10, and 22 & 23 Vict., c. 35, s. 12.

mere powers, and powers in the nature of trusts. The distinction between a power and a trust is marked and obvious. Powers are never imperative, they leave the act to be done at the will of the party to whom they are given. Trusts are always imperative, and are obligatory upon the conscience of the party intrusted.[1] But sometimes trusts and powers are blended; a man may be invested with a trust to be effected by the execution of a power given to him, which is in that case imperative; and if he refuse to execute it, or die without having executed it, equity will interpose and give suitable relief, because his omission to do so by accident or design, ought not to disappoint the objects of the donor.[2]

Distinction between mere powers and powers in the nature of trusts.

A power in the nature of a trust imperative, and non-execution remedied.

In the course of administration of estates, executors and administrators often pay debts and legacies upon the entire confidence that the assets are sufficient for all purposes. It may turn out from unexpected occurrences, or from debts and claims made known at a subsequent time, that there is a deficiency of assets. Under such circumstances they may be entitled to no relief at law. But in a court of equity, if they have acted with good faith and with due caution, they will be clearly entitled to it, upon the ground that otherwise they will be innocently subject to an unjust loss from what the law itself deems an accident.[3] An executor or administrator stands in the condition of a gratuitous bailee, and will not be charged without some default in him. Therefore, if any of the goods of the testator are stolen from the executor, or from the possession of a third person to whose custody they have been delivered by the executor, the latter shall not in equity be charged with these as assets.[4] Again, if the goods be of a perishable nature, and before any

Accident in payment by executors or administrators.

Executors protected in equity if they have acted with good faith and caution.

Executor or administrator, a gratuitous bailee.

[1] Wilm. 23.

[2] *Warneford* v. *Thompson*, 3 Ves. 513; *Brown* v. *Higgs*, 8 Ves. 574.

[3] *Edwards* v. *Freeman*, 2 P. Wms. 447; *Hawkins* v. *Day*, Amb. 160; St. 90.

[4] *Jones* v. *Lewis*, 2 Ves. Sr. 240.

default in the executor to preserve them, or sell them at due value, they are impaired, he shall not answer for the first value, but shall give that matter in evidence to discharge himself.[1]

A minor bound as apprentice, and master becomes bankrupt.

Other illustrations of the doctrine of relief in equity upon the ground of accident may be stated. Suppose a minor is bound as apprentice to a person, and a large premium is given to the master, who becomes bankrupt during the apprenticeship, in such a case equity will interfere, and apportion the premium upon the ground of the failure of the contract from accident.[2]

Reduction of Government stock.

So if an annuity is directed by a will to be secured by public stock, and an investment is accordingly made, sufficient at the time for the purpose, but afterwards the stock is reduced by Act of Parliament, so that it becomes insufficient, equity will decree the deficiency to be made up against the residuary legatees, as an accident.[3]

Cases where equity will not give relief. In matters of positive contract.

And this leads us naturally to the consideration of those cases of accident in which equity will not give relief. In the first place, in matters of positive contract and obligation created by act of parties, but not by operation of law, it is no ground for the interference of equity, that the party has been prevented from fulfilling them by accident; or that he has been in no default; or that he has been prevented by accident from deriving the full benefit of the contract on his own side. Thus, if a lessee on a demise covenants to pay rent, or to keep the demised premises in repair, he will be bound to do so in equity as well as in law, notwithstanding the destruction or injury of those premises by inevitable accident, as if they are burnt by lightning, or destroyed by public enemies, or by

Destruction of demised premises.

[1] *Clough* v. *Bond*, 3 My. & Cr. 496; Wms. on Exors. 1666–1679.

[2] *Hale* v. *Webb*, 2 Bro. C. C. 78.

[3] *Davies* v. *Wattier*, 1 Sim. & St. 463; *May* v. *Bennet*, 1 Russ. 370; St. 93.

any other accident, or by overwhelming force.[1] The reason is, that he might have provided for such contingencies by his contract, if he had so chosen; and the law will presume an intentional general liability where he has made no exception.[2]

The party might have provided against the accident.

And the like doctrine applies to other cases of contract where the parties are equally innocent. Thus, for instance, if there is a contract for a sale at a price to be fixed by an award, during the life of the parties, and one of them dies before the award is made, the contract fails, and equity will not enforce it, upon the ground of accident; for the time of making the award is expressly fixed in the contract, according to the pleasure of the parties; and there is no equity to substitute a different period.[3]

Contracts where parties are equally innocent.

In the next place, courts of equity will not grant relief to a party upon the ground of accident, where the accident has arisen from his own gross negligence or fault; for, in such a case, the party has no claim to come into a court of justice, to ask to be saved from his own culpable misconduct.[4]

Where party claiming relief has been guilty of gross negligence.

Again, courts of equity will not interpose upon the ground of accident, where a party has not a clear vested right; but his claim rests in mere expectancy, and is a matter not of trust, but of volition. As if a testator, intending to make a will in favour of particular persons, is prevented from doing so by accident, equity cannot grant relief; for a legatee or devisee is a mere volunteer taken by the bounty of the testator, and has no independent right, until there is a title consummated by law.[5]

Party claiming relief must have a clear vested right.

[1] *Bullock* v. *Dommitt*, 6 T. R. 650; *Brecknock Can. Co.* v. *Pritchard*, 6 T. R. 750; *Belfour* v. *Weston*, 1 T. R. 310; *Pym* v. *Blackburn*, 3 Ves. 34, 38.

[2] St. 101.

[3] St. 103; *Blundell* v. *Brettargh*, 17 Ves. 232-240; *White* v. *Nutts*, 1 P. Wms. 61; *Mortimer* v. *Capper*, 1 Bro. C. C. 156.

[4] *Ex parte Greenway*, 6 Ves. 812.

[5] St. 105, *a*; *Whitton* v. *Russel*, 1 Atk. 448.

Equity will not aid where the other party has an equal equity.

In the next place, no relief will be granted in equity where the other party stands upon an equal equity, and is entitled to equal protection, as in the case of a *bonâ fide* purchaser for valuable consideration without notice.[1]

Summary.

Finally, upon a general survey of the grounds of equitable jurisdiction in cases of accident, the following conclusions may perhaps be drawn; that equity will give relief where the party seeking it has a clear right, which cannot otherwise be enforced in a suitable manner, or that he will be subjected to an unjustifiable loss, without any blame or misconduct on his own part; or that he has a superior equity to the party from whom he seeks the relief.

[1] St. 106, 108; *Powell* v. *Powell*, Prec. Ch. 278; *Malden* v. *Menill*, 2 Atk. 8.

CHAPTER II.

MISTAKE.

Mistake.

MISTAKE, as recognised and remedied in a court of equity, may be defined, in contradistinction from accident, as some unintentional act or omission or error arising from ignorance, surprise, imposition, or misplaced confidence.[1]

This subject may be divided into two classes of cases—

I. Mistakes in matter of law.
II. Mistakes in matter of fact.

Ignorantia legis neminem excusat.

I. As to mistakes in matter of law, it is a well-known maxim that ignorance of the law will not furnish an excuse for any person either for a breach or omission of duty, — *Ignorantia legis neminem excusat*—and this maxim is as much respected in equity as at law.[2] The presumption is that every one is acquainted with his own rights, provided he has had a reasonable opportunity of knowing them. And nothing can be more liable to abuse than to permit a person to reclaim his property upon the mere pretence that, at the time of parting with it, he was ignorant of the law affecting his title.[3]

An agreement under a mistake of law binding.

An agreement entered into in good faith, though under a mistake of law, will be held valid and obligatory upon the parties. Thus, where a devise was made to a woman upon condition that she should

[1] St. 110. [2] St. 111. [3] St. 111.

marry with the consent of her parents, and she married without such consent, whereby a forfeiture accrued to other parties, who afterwards executed an agreement respecting the estate, whereby the forfeiture was in effect waived, the court refused any relief. Lord Hardwicke said, "It is said they might know the fact (*i.e.*, of the marriage without consent) and yet not know the consequence in law; but if parties are entering into an agreement, and the very will out of which the forfeiture arose is lying before them and their counsel, while the drafts are preparing, the parties shall be supposed to be acquainted with consequence of law as to this point, and shall not be relieved on pretence of being surprised, with such strong circumstances attending it."[1]

Apparent exceptions to the rule where there are circumstances of fraud.

Although it is clear that relief will not be granted in equity against a mistake in point of law, with full knowledge of all the facts, there are certain cases apparently exceptions to this general rule, and usually so classed, but which, upon examination, will be found to have turned, not upon the consideration of a mere mistake of law, stripped of all other circumstances, but upon an admixture of other ingredients going to establish misrepresentation, imposition, undue confidence, undue influence, mental imbecility, or that sort of surprise which equity uniformly regards as a just foundation for relief.[2]

Where a party acts under ignorance of a plain and well-known principle of law.

Thus, it has been laid down as an unquestionable doctrine, that if a party, acting in ignorance of a clear and settled principle of law, is induced to give up a portion of his undisputable property to another, under the name of a compromise, a court of equity will relieve him from the effect of his mistake.[3]

[1] *Pullen* v. *Ready*, 2 Atk. 591; *Irnham* v. *Child*, 1 Bro. C. C. 92; *Worrall* v. *Jacob*, 3 Mer. 255.

[2] St. 120; *Willan* v. *Willan*, 16 Ves. 82.

[3] St. 121.

Thus, if the eldest son, who is heir-at-law of all the undisposed-of fee-simple estates of his ancestor, should, in gross ignorance of the rule of law, knowing, however, that he was the eldest son, agree to divide the estates with the younger brother, such an agreement would be held in a court of equity invalid, and relief would be granted.[1] Here, ignorance of a plain and established doctrine so generally known, and of such constant occurrence, as a common canon of descent, may well give rise to a presumption that there has been some undue influence, imposition, mental imbecility, surprise, or confidence abused. But in such cases the mistake of the law is not the foundation of the relief, but it is the medium of proof to establish some other proper ground of relief.[2] And perhaps, in this case, his ignorance of his being the heir-at-law may be considered a mistake of a fact as well as of law, and on that ground alone might entitle him to relief.[3]

Creates a presumption of fraud, or *mala fides*.

But where the mistake arises not from ignorance of a plain and settled principle of law, but on a doubtful point, such as the construction of a will, a different rule prevails; and a compromise fairly entered into, with due deliberation and full knowledge, will be upheld in a court of equity as reasonable in itself, to terminate the differences by dividing the stake, and as supported by principles of public policy.[4]

Where mistake arises on a doubtful point of law, a compromise will be upheld.

It is upon this ground that the whole doctrine of the validity of family compromises of doubtful rights rests. The principle has been fully established that, when family agreements have been fairly entered into, without concealment or imposition on either side, with no suppression of what is true, or suggestion of what is

Family compromises upheld on this ground. There must be no *suppressio veri*, or *suggestio falsi*, but a full disclosure.

[1] St. 122.
[2] St. 128.
[3] *Broughton* v. *Hutt*, 3 De G. & Jo. 501; and see remarks of Lord Westbury in *Cooper* v. *Phibbs*, L. R. 2 H. L. 170.
[4] St. 121; *Pickering* v. *Pickering*, 2 Beav. 56; *Gibbons* v. *Caunt*, 4 Ves. 849; *Naylor* v. *Winch*, 1 S. & S. 564.

false, each of the parties investigating the subject for himself, and each communicating to the other all he knows, and all the information which he has received on the question, then, although the parties may have greatly misunderstood their position, and mistaken their rights, a court of equity will not disturb the quiet which is the consequence of that agreement.[1] "Wherever doubts and disputes have arisen with regard to the rights of different members of the same family, and especially where those doubts have related to a question of legitimacy, and fair compromises have been entered into to preserve the harmony and affection, or to save the honour of the family, those arrangements have been sustained by this court, albeit, perhaps, resting upon grounds which would not have been considered as satisfactory if the transaction had occurred between strangers."[2] And these principles will apply whether the doubtful points, with reference to which the compromise has been made, are matters of fact or of law.[3]

Family compromises upheld on public grounds.

But in order that a transaction, not otherwise valid, may be supported upon the ground of its being a family arrangement, there must be a full and fair communication of all material circumstances affecting the subject matter of the agreement, which are within the knowledge of the several parties, whether such information be asked for by the other party or not.[4] "There must not only be good faith and honest intention, but full disclosure; and without full disclosure, honest intention is not sufficient."[5] And especially if parties are not on equal terms, and one of them stands in such relation to the other as renders it incumbent on him to give a full account of the matter in dispute, to the utmost of his knowledge, and he omits to do so, the

There must be a full and fair communication of all the material circumstances known.

[1] *Gordon* v. *Gordon*, 3 Swanst. 463.

[2] *Westby* v. *Westby*, 2 Dr. & War. 503.

[3] *Neale* v. *Neale*, 1 Kee. 672; *Westby* v. *Westby*, 2 Dr. & War. 503.

[4] *Greenwood* v. *Greenwood*, 2 De G. Jo. & Sm. 28.

[5] *Gordon* v. *Gordon*, 3 Swanst. 400.

court, although no intentional fraud may be imputable to such person, will not support a compromise entered into between the parties.[1]

And the disinclination of equity to set aside a family or other compromise entered into *bonâ fide*, and with a full disclosure of all facts known to either party, will be strengthened, where subsequent arrangements have taken place on the footing of such a family compromise.[2] But where there is a mixture of mistake of title, gross personal ignorance, liability to imposition, habitual intoxication, and want of professional advice, courts of equity have manifested a strong disinclination to support a compromise, whether between members of a family or between strangers.[3]

Equity will not aid where position of parties has been altered.

Cases of surprise, combined with a mistake of law, stand upon a ground peculiar to themselves. In such cases the agreements or acts are unadvised and improvident, and without due deliberation; and therefore they are held invalid upon the common principle adopted by courts of equity, to protect those who are unable to protect themselves, and of whom an undue advantage is taken.[4] Where the surprise is mutual there is of course a still stronger ground to interfere, for neither party has intended what has been done. They have misunderstood the effect of their own agreements or acts: or have pre-supposed some facts or rights existing, as the basis of their proceedings, which in truth did not exist.[5]

Surprise combined with a mistake of law remedied.

It has been already stated that where a *bonâ fide* purchaser for valuable consideration, without notice, is

[1] *Pusey* v. *Desbouvrie*, 3 P. Wms. 315; *Sturge* v. *Sturge*, 12 Beav. 229.

[2] *Clifton* v. *Cockburn*, 3 My. & K. 76; *Bentley* v. *Mackay*, 31 Beav. 143, 10 W. R. 873.

[3] St. 133; *Dunnage* v. *White*, 1 Swanst. 137; *Persse* v. *Persse*, 7 C. & Fin. 318.

[4] St. 134; *Evans* v. *Llewellyn*, 2 Bro. C. C. 150; *Ormond* v. *Hutchinson*, 13 Ves. 51.

[5] St. 134; *Willan* v. *Willan*, 16 Ves. 72, 81; *Cochrane* v. *Willis*, L. R. 1 Ch. 58.

Equity will not aid against a *bonâ fide* purchaser for value without notice.

concerned, equity will not interfere to grant relief in favour of a party, although he has acted in ignorance of his title upon a mistake of law; for in such a case the purchaser has at least an equal right to protection with the party who has committed the mistake; and where the equities are equal, the court will not interfere between the parties.[1]

Mistakes of fact. Generally relieved against in equity.

II. As to mistakes of fact, the general rule is that an act done, or contract made, under a mistake or in ignorance of a material fact, is voidable and relievable in equity; for it is not possible that any one can, by any amount of diligence, acquire a knowledge of all matters of fact.[2] With reference to this subject, the following general propositions may be laid down:—

1. Fact must be material.

1. The rule as to ignorance, or mistake of a fact entitling the party to relief, is to be taken with this important qualification,—that the fact must be material to the act or contract; that is, that it must be essential to its character. For though there may be an accidental ignorance, or mistake of a fact, yet, if the act or contract is not materially affected by it, the party claiming relief will be denied it.[3] And the same principle is applicable though the mistake be mutual, as if a person should sell a messuage to another which was at the time swept away by a flood, without any knowledge of the fact by either party, equity would relieve the purchaser upon the ground that both parties intended the purchase and sale of a subsisting thing, and implied its existence as the basis of their contract.[4]

Relief given though the mistake is mutual.

2. It is not, however, sufficient in all cases to give the party relief, that the fact is material; but it

[1] St. 139; *Malden* v. *Menill*, 2 Atk. 8.
[2] St. 140.
[3] St. 141.
[4] St. 142; *Hore* v. *Becher*, 12 Sim. 465; *Cochrane* v. *Willis*, L. R. 1 Ch. 58.

must be such, as he could not by reasonable diligence get knowledge of, when he was put upon inquiry. For, if by such reasonable diligence he could have obtained knowledge of the fact, equity will not relieve him, since that would be to encourage culpable negligence.[1]

2. Fact must be such as party could not get knowledge of by diligent inquiry.

3. In cases where one of the contracting parties has knowledge of a fact material to the contract which he does not communicate to the other, it is necessary in order that the latter may set aside the transaction on the ground of such concealment, that the former should have been under an obligation, not merely moral, but legal or equitable, to make the discovery.[2]

3. Party having knowledge must have been under an obligation to discover the fact.

4. Where the means of information are open to both parties, and where each is presumed to exercise his own skill, diligence, and judgment with regard to a subject matter, where there is no confidence reposed, but each party is dealing with the other at arm's length, equity will not relieve.[3] And, therefore, where the fact is equally unknown to both parties; or where each has equal and adequate means of information; or where the fact is doubtful from its own nature; in every such case, if the parties have acted with entire good faith, a court of equity will not interpose.[4]

4. Where means of information are equally open to both, and no confidence reposed, no relief.

The general ground upon which all these distinctions proceeds is, that mistake or ignorance of facts in parties is a proper subject of relief only where it constitutes a material ingredient in the contract of the parties, or disappoints their intention by a mutual error; or where it is inconsistent with good faith,

Grounds for equitable relief.

[1] St. 146.
[2] St. 207.
[3] St. 149.
[4] St. 150; *Mortimer* v. *Capper*, 1 Bro. C. C. 158, 6 Ves. 24; *Ainslie* v. *Medlycott*, 9 Ves. 13.

and proceeds from a violation of the obligations which are imposed by law upon the conscience of either party. But where each party is equally innocent, and there is no concealment of facts which the other party has a right to know, and no surprise or imposition exists, the mistake or ignorance, whether mutual or unilateral, is treated as laying no foundation for equitable interference.[1]

Oral evidence generally inadmissible to vary a written document.

It is a general rule of law that oral evidence shall in no case be received as equivalent to, or as a substitute for, a written instrument, where the latter is required by law, or to give effect to a written instrument which is defective in any particular, which, by law, is essential to its validity; or to contradict, alter, or vary a written agreement, either appointed by law or by the compact of private parties, to be the appropriate and authentic memorial of the particular facts which it recites.[2] But, upon principle, oral evidence is admissible to show that either by accident, mistake, or fraud, a written agreement has not been constituted the depository of the intention and meaning of the parties. To enforce the performance of an agreement under such circumstances would be the highest injustice—it would be to allow an act, originating in innocence, to operate ultimately as a fraud, by enabling the party who receives the benefit of the mistake or accident, to resist the claims of justice, under shelter of a rule framed to promote it.[3]

Exceptions in case of accident, mistake, or fraud.

A mistake, not of law, in a written document may be proved by extrinsic evidence.

The general rule, as to the admissibility of evidence in cases of mistake, may be thus stated:—Where, by mistake, an instrument *inter vivos* is not what parties intended, or there is a mistake in it, other than a mistake in law, and the mistake is clearly made out by admissible and satisfactory evidence, or is admitted

And the in-

[1] St. 151.
[2] 3 Starkie on Ev. 753.
[3] St. 155; *Murray* v. *Parker*, 19 Beav. 308.

by the other side,[1] or is evident from the nature of the case, or from the rest of the deed, equity will rectify the mistake.[2]

strument will be rectified accordingly.

Courts of equity will grant relief in cases of mistake in written contracts, not only when the fact of the mistake is expressly established, but also when it is fairly implied, from the nature of the transaction. Thus, a partnership debt has been treated in equity as the several debt of each partner, though at law, it is the joint debt of all. But there all have had a benefit from the money advanced, or the credit given, and the obligation to pay exists independently of any instrument by which the debt may have been secured. So where a joint bond has in equity been considered as several, there has been a credit previously given to the different persons who have entered into the obligation. It was not the bond that first created the liability to pay.[3]

Mistake implied from nature of the case.

A partnership debt, though joint at law, treated in equity as joint and several.

Because there is an original joint and several liability.

But where the inference of a joint original debt or liability does not exist, a court of equity will not interfere unless there is evidence of mistake. The Master of the Rolls, in *Sumner* v. *Powell*,[4] thus expresses himself:—"It has never been determined that every joint covenant is in equity to be considered as the several covenant of each of the covenantors. . . . . When the obligation exists only by virtue of the covenant, its extent can be measured only by the words in which it is conceived. . . . . But in this case the covenant is purely a matter of arbitrary convention, growing out of an antecedent liability in all or any of the covenantors to do what they have thereby undertaken. . . . . It is not attempted to be

When obligation exists by virtue of the covenant alone, it must be measured by the covenant.

[1] *Davis* v. *Symonds*, 1 Cox, 404; *Russel* v. *Davy*, 6 Gr. 165.

[2] Sm. Man. 49; *Murray* v. *Parker*, 19 Beav. 305; *Fowler* v. *Fowler*, 4 De G. & Jo. 250; *Townshend* v. *Stangroom*, 6 Ves. 333.

[3] *Sumner* v. *Powell*, 2 Mer. 36; *Devaynes* v. *Noble*, 1 Mer. 538.

[4] 2 Mer. 36.

shown that there was any mistake in drawing the deed, or that there was any agreement for a covenant of a different sort. There is nothing but the covenant itself, by which its intended extent can be ascertained. There is no ground, therefore, on which a court of equity can give it any other than its legal operation and effect."[1]

Rectification of mistakes in marriage settlements.

There is less difficulty in reforming written instruments where the mistake is mainly or wholly made out by other preliminary written instruments or memoranda of the agreement. This is strongly illustrated in cases of marriage settlements. With reference to these, four cases may occur.

1. Both marriage articles and settlement before marriage.

1. Both the marriage articles, as well as the definitive settlement, may exist before the marriage. In this case, if the articles and the settlement vary in their terms, the settlement will in general be considered the binding instrument, and will not be controlled by the articles, because, as observed in *Legg* v. *Goldwire*,[2] "When all parties are at liberty, the settlement will be taken as a new agreement."

2. Where prenuptial settlement purports to be in pursuance of the articles.

2. But where, however, the settlement, though made before marriage, purports to be in pursuance of articles entered into before marriage, and there is a variance, the settlement will be rectified, and extrinsic evidence need not be resorted to.[3]

3. Extrinsic evidence admissible to show that prenuptial settlement was made in pursuance of articles.

3. But although a settlement made before marriage contains no reference to the articles, yet if it can be shown that the settlement was intended to be in conformity with the articles, and there is clear and satisfactory evidence that the discrepancy has arisen from

[1] *Richardson* v. *Horton*, 6 Beav. 187; *Underhill* v. *Horwood*, 10 Ves. 227-8; *Rawstone* v. *Parr*, 3 Russ. 424, 539.

[2] 1 L. C. 17.

[3] *West* v. *Errissey*, 1 Bro. P. C. 225; *Bold* v. *Hutchinson*, 5 De G. M. & G. 568.

a mistake, the court will reform the settlement and make it conformable to the real intention of the parties.[1]

4. Where the settlement is made after marriage, it will, in all cases, whether purporting to be made in pursuance of the pre-nuptial articles or not, be controlled and rectified by them.[2] 4. Settlement after marriage.

In *Barrow* v. *Barrow*,[3] it was held that the erroneous belief by the husband and wife on their marriage that a particular property stood settled, was no ground for rectifying a settlement so as to make it include that property; "where a settlement has been executed, which carried into effect a contract framed under a mistaken apprehension of the facts, and a marriage has been actually solemnised on the faith of that contract and that settlement, it would be to substitnte a new contract between the parties, and not to carry the real contract into effect, if I were to alter the settlement."[4]

The court will not correct an instrument made in consideration of marriage, except on evidence of the mistake of both parties. In a case,[5] where the husband alone laboured under a mistake, Kindersley, V.-C., said:—"The wife is bargaining for herself and her children, and the question always is, What is the contract on which the marriage took place? Here, so far as the wife's contract and understanding are concerned, the contract is the settlement as it stands, though the husband did not understand that it would affect his property."[6] Mistake to be remedied must be of both parties.

[1] *Bold* v. *Hutchinson*, 5 De G. M. & G. 558, 568; *Breadalbane* v. *Chandos*, 2 My. & Cr. 739.
[2] *Legg* v. *Goldwire*, 1 L. C. 17; *Honor* v. *Honor*, 1 P. Wms. 123; *Mignan* v. *Parry*, 31 Beav. 211.
[3] 18 Beav. 529.
[4] *Wilkinson* v. *Nelson*, 9 W. R. 393.
[5] *Sells* v. *Sells*, 1 Dr. & Sm. 45.
[6] *Thompson* v. *Whitmore*, 1 J. & H. 268; *Bradford* v. *Romney*, 30 Beav. 431.

Instrument delivered up or cancelled under a mistake.

Where an instrument has been delivered up or cancelled under a mistake of the party, and in ignorance of the facts material to the rights derived under it, a court of equity will in all cases grant relief, upon the ground that the party is conscientiously entitled to enforce such rights; and that he ought to have the same benefit as if the instrument were in his possession with its entire original validity.[1]

Defective execution of powers.

As to the remedy afforded by equity, in cases of defective execution of powers, arising from mistake, the same general principles are applicable as in cases of defective execution arising from accident.[2]

Mistakes in wills.

In regard to mistakes in wills, there is no doubt that courts of equity have jurisdiction to correct them when they are apparent upon the face of the will, or may be made out by a due construction of its terms, for in cases of wills the intention will prevail over the words. But then the mistake must be apparent on the face of the will, otherwise there can be no relief; for parol evidence or evidence dehors the will, is not admissible to vary or control the terms of the will, although it is admissible to remove a latent ambiguity.[3]

Mere misdescription of legatee will not defeat legacy. Legacy obtained by a false personation.

It is clear that in point of law, a mere misdescription of a legatee will not defeat the legacy. But it is equally clear that wherever a legacy is given to a person under a particular character, which he has falsely assumed, and which can alone be supposed the motive of the bounty, the law will not permit him to avail himself of it; and therefore he cannot demand his legacy.[4] Thus, where a woman gave a legacy to a man, describing him as her husband, when, in

[1] *East India Co.* v. *Donald*, 9 Ves. 275; St. 167.
[2] St. 169-178.
[3] St. 179; *Milner* v. *Milner*, 1 Ves. Sr. 106; *Stebbing* v. *Walkey*, 2 Bro. C. C. 85.
[4] *Giles* v. *Giles*, 1 Keen, 692.

point of fact the marriage was void, he having a former wife then living, the bequest was in equity held void.[1]

Revocation of legacy on a mistake of facts.

Where a legacy is given or revoked upon a mistake of facts, equity will give relief. Thus, if a testator revokes legacies to A. and B. giving as a reason that they are dead, and they are in fact living, equity will hold the revocation invalid, and decree the legacies.[2] But a false reason given for a legacy or for the revocation of a legacy, is not always a sufficient ground to avoid the act or bequest in equity. To have such an effect, it must be clear that no other motive mingled in the legacy, and that it constituted the substantial ground of the act or bequest.[3] In *Kennell* v. *Abbott*,[4] the Master of the Rolls thus expresses himself:—"I desire to be understood not to determine, that where, from circumstances not moving from himself, the description is inapplicable, as where a person is supposed to be a child of the testator, and from motives of love and affection for that child, supposing it to be his own, he has given a legacy to it, and it afterwards turns out that he was imposed upon, and the child was not his own, I am not disposed by any means to determine that the provision for that child should totally fail; for circumstances of personal affection to the child might mix with it, and which might entitle him, though he might not fill that character in which the legacy is given. Neither would I have it understood that if a testator, in consequence of supposed affectionate conduct of his wife, being deceived by her, gives her a legacy as to his chaste wife, evidence of her violation of her marriage vow could be given against that. It would open too wide a field."

[1] *Kennell* v. *Abbott*, 4 Ves. 808.
[2] *Campbell* v. *French*, 3 Ves. 321.
[3] St. 183; *Box* v. *Barrett*, L. R. 3 Eq. 244.
[4] 4 Ves. 808.

The party claiming relief must have a superior equity.

Finally, it must be remembered, that in all cases of relief by aiding and correcting defects or mistakes, the party seeking relief must stand upon some equity superior to that of the party against whom he asks it. If the equities are equal, a court of equity is silent and passive. Thus, equity will not give relief as against a *bonâ fide* purchaser for valuable consideration.[1]

No relief as between volunteers.

Nor will equity relieve one person claiming under a voluntary defective conveyance against another claiming also under a voluntary conveyance, but will leave the parties to their rights at law.[2] Nor will the remedial powers of courts of equity extend to the supplying of any circumstances, for the want of which the legislature has declared an instrument void; for otherwise, equity would in effect defeat the very policy of the legislative enactments.[3]

Or where defect is declared fatal by statute.

[1] *Powell* v. *Price*, 2 P. Wms. 535; *Davies* v. *Davies*, 4 Beav. 54; *Thompson* v. *Simpson*, 1 Dr. & War. 491.

[2] St. 176; *Moodie* v. *Reid*, 1 Mad. 516.

[3] *Hibbert* v. *Rolleston*, 3 Bro. C. C. 571; *Dixon* v. *Ewart*, 3 Mer. 322.

CHAPTER III.

ACTUAL FRAUD.

Fraud. It may be laid down as a general rule that courts of equity exercise a general jurisdiction in cases of fraud, sometimes concurrent with, and sometimes exclusive of, the common law courts. There are a variety of cases of fraud for which the common law affords complete and adequate relief, and with reference to these cases, Chancery may be said to possess a general and perhaps a universal *concurrent* jurisdiction. But there are many cases in which fraud is utterly irremediable at law, and over these courts of equity have an exclusive jurisdiction.

No invariable rule as to relief. "As to relief against frauds no invariable rules can be established. Fraud is infinite; and were a court of equity once to lay down rules how far they would go, and no farther, in extending their relief against it, or to define strictly the species or evidence of it, the jurisdiction would be cramped and perpetually eluded by new schemes, which the fertility of man's invention would contrive."[1]

To attempt, therefore, the definition of a subject so varied and diversified in its forms as fraud, would scarcely be judicious or useful, if it were possible. The mode and extent of the equity jurisdiction over fraud will best be illustrated by the examination of a few of the more marked classes of cases, in which the principles which regulate the action of courts of equity

[1] Park's Hist. of Chan. 508; St. 186.

are fully developed, and from which analogies may be drawn to guide us in the investigation of other and novel circumstances.[1]

Equity acts upon weaker evidence than law in inferring fraud.

Before, however, proceeding to those subjects, it may be proper to observe that although courts of law, equally with courts of equity, hold that fraud is not to be presumed, the latter courts will act upon circumstances as presumptions of fraud, where courts of common law would not deem them satisfactory proofs. In other words, courts of equity will grant relief upon the ground of fraud established by presumptive evidence, which evidence courts of law would not always deem sufficient proof to justify a verdict at law.[2]

The subject of fraud may be divided into two sections, Actual Fraud and Constructive Fraud.

Actual fraud.

An Actual fraud may be defined as something said, done, or omitted, with the design of perpetrating what the party must have known to be a positive fraud.[3]

Of two kinds.

Actual frauds are of two kinds [4]—

I. Those, so called, from a consideration of the conduct of the guilty parties, irrespective of any peculiarity in the position of the injured parties.

II. Those frauds arising chiefly from a consideration of the peculiar condition of the parties on whom it is practised.

1. Arising from the conduct of parties irrespective of position of injured party.

1. (*a.*) One of the largest classes of cases in which courts of equity are accustomed to grant relief is where there has been a misrepresentation, or *suggestio falsi.*

[1] St. 189.
[2] *Chesterfield* v. *Janssen*, 1 L. C. 483; *Fullager* v. *Clarke*, 18 Ves. 483; St. 190.
[3] Sm. Man. 55.
[4] Sim. Man. 57.

With reference to this subject the following propositions may be laid down:— Misrepresentation.

Where a party intentionally, or by design, misrepresents a material fact, or produces a false impression in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage over him, in every such case there is a positive fraud, in the truest sense of the terms.[1] Where the party makes it intentionally.

And not only does fraud exist where the statements are known to be false by those who made them, but a case of fraud is also constituted where statements, false in fact, are made by persons who do not know them to be true or false, or who believe them to be true, if in the due discharge of their duty, they ought to have known, or if they had formerly known, and ought to have remembered the fact, which negatives the representation made.[2] Where party did not know his assertion to be true.

Every man must be held responsible for the consequences of a false representation made by him to another, upon which a *third person* acts; and so acting is injured or damnified, provided it appear that such false representation was made with the intent that it should be acted upon by such third person in the manner that occasions the injury or loss, and provided the injury be the immediate and not the remote consequence of the representation thus made.[3] Misrepresentation made with intent to mislead a *third* party.

As a matter of conscience any deviation from the most exact and scrupulous sincerity is contrary to the good faith that ought to prevail in contracts. But courts of justice generally find themselves compelled to assign limits to the exercise of their jurisdiction, far

[1] St. 192; *Hill* v. *Lane*, L. R. 11 Eq. 215.

[2] St. 193; *Pulsford* v. *Richards*, 17 Beav. 94; *Rawlins* v. *Wickham*, 1 Giff. 355; 3 De G. & Jo. 304.

[3] *Barry* v. *Croskey*, 2 Johns. & Hem. 22.

short of the principles deducible *ex æquo et bono;* and with reference to the concerns of human life they endeavour to aim at mere practical good and general convenience.[1] Accordingly, therefore, a misrepresentation, in order to justify the rescission of a contract, must be *as to some material fact constituting an inducement or motive to the act or omission of the other party.*[2] "To use the expression of the Roman law, it must be a representation, *dans locum contractui*, that is, a representation giving occasion to the contract; the proper interpretation of which appears to me to be the assertion of a fact on which the person entering into the contract relied, and in the absence of which it is reasonable to infer that he would not have entered into it; or the suppression of a fact, the knowledge of which it is reasonable to infer would have made him abstain from the contract altogether.[3]

Misrepresentation must be of some material fact.

It must be *dans locum contractui.*

Misrepresentation must be of something in which there is a confidence reposed.

In the next place, the misrepresentation must be not only in something material, but it must be something in regard to which the one party places a known trust or confidence in the other. It must not be a mere matter of opinion, equally open to both parties for examination and inquiry, where neither party is presumed to trust the other, but to rely on his own judgment.[4]

Caveat emptor where purchaser chooses to judge for himself.

But if the purchaser, choosing to judge for himself, does not avail himself of the knowledge, or means of knowledge, open to him or his agents, he cannot be heard to say that he was deceived by the vendor's misrepresentations, for the rule is *caveat emptor.*[5] To this ground of unreasonable indiscretion and confidence, may be referred the common language of puffing and commendation of commodities, which, however repre-

[1] St. 194.
[2] St. 195.
[3] *Pulsford* v. *Richards*, 17 Beav. 96.
[4] St. 197.
[5] St. 200 (*a.*)

hensible in morals, as gross exaggerations or departures from truth, are nevertheless not treated as frauds which will avoid contracts. *Simplex commendatio non obligat.*[1]

The party must be misled by the representation.

In the next place, the party must be misled by the representation; for if he knows it to be false when made it cannot influence his conduct, and it is his own indiscretion, and not any fraud or surprise, of which he has any just complaint to make under such circumstances.[2]

The party must have been misled to his prejudice.

And further, the party must have been misled to his prejudice or injury; for courts of equity do not, any more than courts of law, sit for the purpose of enforcing moral obligations, or correcting unconscientious acts, which are followed by no loss or damage.[3]

If misrepresentation can be made good, equity will compel it.

Where a person has been induced to enter into a contract by a material misrepresentation of the other party, the latter shall be compelled to make it good at the option of the former, if the representation be one which can be made good; if not, the person deceived shall be at liberty to avoid the contract.[4]

A person to avail himself of another's fraud must himself be innocent and have given value.

A person cannot avail himself of what has been obtained by the fraud of another, unless he is not only free from any participation in the fraud, but also has given some valuable consideration.[5]

Ratification.

The defrauded party may, by his subsequent acts, with full knowledge of the fraud, deprive himself of all right to relief, as well in equity, as at law; as if with

[1] St. 201.
[2] St. 202; *Nelson* v. *Stocker*, 4 De G. & Jo. 458.
[3] St. 203; *Slim* v. *Croucher*, 1 De G. F. & J. 518; *Fellowes* v. *Gwydyr*, 1 Sim. 63.
[4] *Pulsford* v. *Richards*, 17 Beav. 95; *Rawlins* v. *Wickham*, 3 De G. & Jo. 304, 322.
[5] *Scholefield* v. *Templer*, 4 De G. & Jo. 433.

full knowledge of the fraud he gives a release to the party who has defrauded him, or has continued to deal with him after he knew all the facts.[1]

Suppressio veri.

(*b.*) Another class of cases for relief in equity, is where there is an undue concealment, or *suppressio veri*, to the injury or prejudice of another. A *suppressio veri* is as fatal as a *suggestio falsi*. It is not every concealment, even of facts material to the interests of a party which will entitle him to the interposition of a court of equity. The case must amount to the suppression of facts which one party, under the circumstances, is bound in conscience and duty to disclose to the other party, in respect of which he cannot be innocently silent, and which the other party has a right, not merely *in foro conscientiæ* but *juris et de jure*, to know.[2]

The facts must be such as the party was under a legal obligation to disclose.

Purchase of land with mine unknown to vendor, but known to vendee.

Thus it has been said by Lord Thurlow in *Fox* v. *Mackreth*,[3] that if A., knowing of a mine on the estate of B., of which he knows B. to be ignorant, should, concealing the fact, enter into a contract to purchase that estate for a price which it would be worth, without considering the mine, the contract would be good. In such cases the question is not whether an advantage has been taken, which in point of morals is wrong, or which a man of delicacy would not have taken. But it is essentially necessary, in order to set aside the transaction, not only that a great advantage should be taken, but it is also necessary to show some obligation binding the party to make the discovery.[4]

Sale of land, subject to incumbrances known only to vendor.

On the other hand, if a vendor should sell an estate knowing he had no title to it, or knowing that there were incumbrances on it of which the vendee was

[1] St. 203 (*a.*); *Vigers* v. *Pike*, 8 Cl. & Fin. 562, 630.
[2] St. 204, 207; *Fox* v. *Mackreth*, 1 L. C. 104; *Turner* v. *Harvey*, Jacob, 178.
[3] 2 Bro. C. C. 420.
[4] St. 205.

ignorant, the suppression of such a material fact, in respect to which the vendor must know, that the very purchase implied a trust and confidence on the part of the vendee, that no such defect existed, would clearly avoid the sale on the ground of fraud.[1]

As to intrinsic defect in personal chattels, *caveat emptor*. Unless there be some artifice or warranty. Or vendor was bound to disclose.

In many cases, especially in cases of sales of personal chattels, the maxim *caveat emptor* is applied; and unless there be some misrepresentation or artifice to disguise the thing sold, or some warranty as to its character or quality, and unless the vendor is under some obligation to make a disclosure, the vendee is understood to be bound by the sale, notwithstanding there may be any intrinsic defects in it known to the vendor, but unknown to the vendee, materially affecting its value.[2]

Silence sometimes tantamount to direct affirmation.

But there are, on the other hand, certain cases where from the very nature of the transaction, the silence of the party—his concealment of a fact—must import as much as a direct affirmation, and be deemed equivalent to it. Cases of insurance afford a ready illustration of this doctrine. In such cases the underwriter necessarily reposes a trust and confidence in the insured, as to all facts and circumstances which are peculiarly within his own knowledge, and which are not of a public and general nature, or which the underwriter either knows or is bound to know. Indeed, most of the facts and circumstances which may affect the risk are generally within the knowledge of the insured only; and, therefore, the underwriter may be said emphatically to place trust and confidence in him as to all such matters. And hence, the general principle is, that in all cases of insurance the insured is bound to communicate to the underwriter all facts

Cases of insurance.

The insured must communicate all material facts within his knowledge.

[1] St. 208; *Arnot* v. *Biscoe*, 1 Ves. Sr. 95, 96; *Edwards* v. *M'Leay*, 2 Swanst. 287; *Ellard* v. *Llandaff*, 1 Ball & B. 241.

[2] St. 212; *Martin* v. *Morgan*, 1 Brod. & Bing. 289; *Walker* v. *Symonds*, 3 Swanst. 62.

and circumstances, material to the risk, within his knowledge; and if they are withheld, whether the concealment be by design or by accident, it is equally fatal to the contract.[1]

Inadequacy of consideration will not *per se* avoid a contract.

Inadequacy of consideration, or any other inequality in the bargain, is not to be understood as constituting, *per se*, a ground to avoid a bargain in equity.[2] For courts of equity, as well as of law, act upon the ground that every person who is not, from his peculiar circumstances or condition, under disability, is entitled to dispose of his property in such manner, and upon such terms as he chooses. Besides, the value of a thing is what it will produce, in its nature fluctuating, and depending on a thousand different circumstances. One man, in the disposal of his property, may sell it for less than another would. He may sell it under a pressure of circumstances which may induce him to part with it at a particular time. On the other hand, the sole inducement to a purchaser may be the lowness of the price; or the purchaser may have simply accepted the proposals of the vendor, instead of being the originator of the transaction, like a man whose design is to gain a fraudulent advantage over another.[3]

Inadequacy may be evidence of fraud, and then it will avoid a contract. It must be inadequacy shocking the conscience.

Still, however, there may be such unconscionableness or inadequacy in a bargain as to demonstrate some gross imposition or undue influence; and in such cases courts of equity will interfere upon the ground of fraud. But then such unconscionableness, or such inadequacy should be made out as would shock the conscience, and amount in itself to conclusive and decisive evidence of fraud. And where there are other ingredients in the case of a suspicious nature, gross

[1] St. 216; *Pole* v. *Fitzgerald*, 4 Bro. P. C. 439; *Da Costa* v. *Scandret*, 2 P. Wms. 170; *Proudfoot* v. *Montefiore*, L. R. 2 Q. B. 511.

[2] *Abbott* v. *Sworder*, 4 De G. & Sm. 448; *Harrison* v. *Guest*, 6 De G. M. & G. 424.

[3] Sm. Man. 63; St. 245.

inadequacy must furnish the most vehement presumption of fraud.[1] As if proper time is not allowed to the party, and he acts improvidently; if he is importunately pressed; if those in whom he places confidence make use of strong persuasions; if he is not fully aware of the consequences, but is suddenly drawn into the act; if he is not permitted to consult disinterested friends or counsel before he is called upon to act in circumstances of sudden emergency or unexpected right or acquisition; in these, and many like cases, if there has been gross inequality in the bargain, courts of equity will set aside the contract at the instance of the party defrauded.[2]

Harrison v. *Guest*.

In *Harrison* v. *Guest*,[3] where, after the death of a vendor, the sale was impeached by his personal representatives, on the ground that at the time of the sale he was an illiterate, bedridden old man of seventy-one years of age, and had acted without independent professional advice, and had conveyed away the property in question, of the value of £400, for the consideration of a provision by way of board and lodging during his life, which only endured six weeks after the conveyance, it was held that, in the absence of any fraud, and the evidence showing that he had declined to employ professional advice for himself, such a transaction was not impeachable on the mere ground of inadequacy of consideration.[4]

Equity will not aid where parties cannot be placed *in statu quo*.

But courts of equity will not relieve in all cases, even of very gross inadequacy, attended with circumstances which might otherwise induce them to act, if the parties cannot be placed *in statu quo;* as, for instance, in cases of marriage settlements, for the court cannot unmarry the parties.[5]

[1] St. 246; *Harrison* v. *Guest*, 6 De G. M. & G. 424.
[2] St. 251.
[3] 6 De G. M. & G. 424.
[4] *Abbott* v. *Sworder*, 4 De G. & S. 448; *Longmate* v. *Ledger*, 2 Giff. 157.
[5] St. 250; *North* v. *Ansell*, 2 P. Wms. 619.

Gifts and legacies on condition against marrying without consent.

Gifts and legacies are often bestowed upon persons upon condition that they shall not marry without the consent of parents, guardians, or other confidential persons. In such a case the doctrine is now firmly established that courts of equity will not suffer the manifest object of the condition to be defeated by the fraud, or dishonest, corrupt, or unreasonable refusal of the party whose consent is required to the marriage.[1]

Cases of fraud arising from the condition of the injured parties.

II. Cases of fraud, arising chiefly from the peculiar condition of the injured parties.

Free and full consent necessary to every agreement.

The general theory of the law, in regard to acts done and contracts made, by parties, affecting their rights and interests, is that in all such cases there must be a free and full consent to bind the parties. Consent is an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side. And, therefore, it has been well remarked that every true consent supposes three things: first, a physical power; secondly, a moral power; and thirdly, a serious and free use of them.

1. Persons *non compotes mentis*.

1. Hence it is that the contracts and other acts of idiots, lunatics, and other persons *non compotes mentis*, wherever, from the nature of the transaction, there is not evidence of entire good faith, or the contract or other act is not seen to be just in itself, or for the benefit of those persons, will be set aside in a court of equity, or made subservient to their just rights and interests.[2] Where, indeed, a contract is entered into with good faith, and is for the benefit of such persons, such as for necessaries, courts of equity, as well as of law, will uphold the transaction. And so, if a purchase is made in good faith, without any knowledge of the incapacity, and no advantage has been taken of

A contract with a lunatic in good faith, and for his benefit, will be upheld.

[1] St. 257; *Dashwood* v. *Bulkeley*, 10 Ves. 245; *Clarke* v. *Parker*, 19 Ves. 18.

[2] St. 228.

the party, courts of equity will not interfere to set aside the contract, if injustice will thereby be done to the other side, and the parties cannot be placed *in statu quo*, or in the state in which they were before the purchase.[1]

2. Drunkenness.

2. But to set aside any act or contract on account of drunkenness, it is not sufficient that the party is under undue excitement from liquor. It must rise to that degree which may be called excessive drunkenness, where the party is utterly deprived of the use of his reason and understanding; for in such a case there can in no just sense be said to be a serious and deliberate consent on his part. If there be not that degree of excessive drunkenness, then courts of equity will not interfere at all, unless there has been some contrivance or management to draw the party into drink, or some unfair advantage taken of his intoxication. For in general, courts of equity, as a matter of public policy, do not incline, on the one hand, to lend their assistance to a person who has obtained a deed or agreement from another in a state of intoxication; and on the other hand, they are equally unwilling to assist the intoxicated party to get rid of his agreement or deed merely on the ground of his intoxication at the time. They will leave the parties to their ordinary remedies at law, unless there is some contrivance or some imposition practised.[2]

Must be excessive in order to set aside contract.

Slight intoxication not a cause for relief unless there has been some unfair advantage taken.

Parties left to their remedy at law.

3. Imbecile persons.

3. Closely allied to the foregoing are cases, where a person, although not positively *non compos*, or insane, is yet of such great weakness of mind as to be unable to guard himself against imposition, or to resist importunity, or undue influence. In such cases, if the circumstances justify the conclusion that the party has been imposed on or circumvented, the transaction will

[1] St. 228; *Manby* v. *Bewicke*, 3 K. & J. 342.

[2] St. 231; *Clarkson* v. *Kitson*, 4 Gr. 244.

be held void in equity; and the burden of proof is on the other party, to show that no unfair advantage was taken of his weakness, and that a fair price was given to him.[1]

4. Persons of competent understanding under undue influence.

Duress.

4. Cases of an analogous nature may easily be put, where the party is subjected to undue influence, although in other respects of competent understanding; as where he does an act or makes a contract when he is under duress, or under the influence of extreme terror, or of threats, or of apprehensions short of duress. For in cases of this sort he has no free will, but stands *in vinculis*. And the constant rule in equity is, that where a party is not a free agent, and is not equal to protecting himself, the court will protect him.[2] Circumstances also of extreme necessity and distress of the party, although not accompanied by any direct restraint or duress, may in like manner justify the court in setting aside a contract by him, on account of some oppression, or fraudulent advantage, or imposition attendant upon it.[3]

Extreme necessity.

5. Infants.

5. The acts and contracts of infants are not as a general rule binding upon them, because the presumption of the law is that they have not sufficient reason or discernment of understanding to bind themselves. There are indeed certain cases in which infants are permitted by law to bind themselves by their acts and contracts, as by contracts for necessaries suitable to their degree and quality, or by a contract of hiring and services for wages, or by some act which the law requires them to do. But generally infants are favoured by the law as well as by equity, in all things which are for their benefit, and are saved from being

Liable for necessaries.

Equity will not uphold an agreement to an infant's prejudice.

[1] *Longmate* v. *Ledger*, 2 Giff. 164; St. 234.

[2] *Evans* v. *Llewellyn*, 1 Cox, 340; *Hawes* v. *Wyatt*, 3 Bro. C. C. 156; *M'Cann* v. *Dempsey*, 6 Gr. 192.

[3] St. 239; *Gould* v. *Okeden*, 4 Bro. P. C. 198; *Farmer* v. *Farmer*, 1 H. L. Cas. 724; *Boyse* v. *Rossborough*, 6 H. L. Cas. 2, 49.

prejudiced by anything to their disadvantage. But this rule is designed as a shield for their own protection, and not as a means to perpetrate a fraud or injustice on others; at least, not where courts of equity have authority to reach it in cases of meditated fraud.[1]

There is an important difference between the acts and contracts of infants, and those of lunatics, idiots, &c. The act or contract of a lunatic or idiot is *ab initio*, void, and can never be validated in any mode. But in regard to the acts and contracts of infants, some are wholly void, others are merely voidable. Where they are utterly void, they are from the beginning mere nullities and incapable of operation. But where they are voidable, it is in the election of the infant to avoid them or not, when he arrives at full age. In general, where a contract may be for the benefit, or to the prejudice of an infant, he may avoid it as well at law, as in equity. Where it can never be for his benefit, it is utterly void.[2]

Acts of a lunatic are void.

Acts of an infant may be voidable.

In regard to *femes covert* the case is still stronger; for, generally speaking, at law they have no capacity to do any acts, or to enter into any contracts, and such acts and contracts are treated as mere nullities. Courts of equity, however, have broken in upon this doctrine, and have in many respects treated the wife as capable of disposing of her own separate property, and of doing other acts, as if she were a *feme sole*. And now under 33 & 34 Vict., c. 93, s. 11, the Married Women's Property Act 1870, a married woman may maintain an action in her own name for the recovery, and has the same remedies, civil as well as criminal, for the protection of property declared by the act to be her separate property, as though she were a *feme sole*. In cases of

Femes covert have not a general capacity to contract at law.

Quasi-power to contract in respect of separate estate in equity. And under 33 & 34 Vict., c. 93.

[1] St. 240. [2] St. 241.

this sort, the same principles will apply to the acts and contracts of a married woman, as would apply to her as a *feme sole*, unless the circumstances give rise to a presumption of fraud, imposition, unconscionable advantage, or undue influence.[1]

[1] St. 243.

CHAPTER IV.

CONSTRUCTIVE FRAUD.

Constructive fraud.

By Constructive Frauds are meant such acts or contracts as, although not originating in any actual evil design or contrivance to perpetrate a positive fraud or injury upon other persons, are yet, by their tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interests, deemed equally reprehensible with positive fraud, and therefore are prohibited by law, as within the same reason and mischief, as acts and contracts done *malo animo*.[1]

Three classes.

The cases under this head may be divided into three classes.

I. Cases of constructive fraud, so called because they are contrary to some general public policy, or to some fixed artificial policy of the law.

II. Constructive frauds, which arise from some peculiar, confidential, or fiduciary relation between the parties.

III. Constructive frauds, which unconscientiously compromit, or injuriously affect, the private rights, interests, or duties of the parties themselves, or operate substantially as frauds upon the private rights, interests, duties, or intentions of third parties.[2]

[1] St. 258. [2] St. 259.

I. Constructive frauds as contrary to policy of the law.

I. Cases of constructive fraud, so called because they are contrary to some general public policy, or to some fixed artificial policy of the law.

Marriage brokage contracts.

Marriage brokage contracts, by which a person engages to give another some reward or remuneration if he will negotiate a marriage for him, are utterly void[1] and incapable of confirmation;[2] and money paid pursuant to such contract may be recovered back in equity.[3]

Reward to parent or guardian to consent to marriage of child.

On the same principle every contract by which a parent or guardian obtains any remuneration for promoting or consenting to the marriage of his child or ward is void.[4]

Secret agreements in fraud of marriage.

The same principle pervades that class of cases where persons, upon a treaty of marriage, by any concealment or misrepresentation, mislead other parties, or do acts which are by other secret agreements reduced to mere forms, or become inoperative. Thus, where a man, on the treaty for the marriage of his sister, let her have money privately, in order that her portion might appear as large as was insisted on by the intended husband, and she gave a bond to her brother for the repayment of it, it was decreed to be delivered up.[5]

Rewards given for influencing another person in making a will.

The same rules are applied to cases where bonds are given, or other agreements made, as a reward for using influence and power over another person to induce him to make a will in favour of the obligor, and for his benefit; for all such contracts tend to deceive and injure others, and encourage artifices and improper attempts to control the exercise of their free judgment.[6]

[1] *Hall* v. *Thynne*, Show. P. C. 76.
[2] *Cole* v. *Gibson*, 1 Ves. Sr. 503; *Roberts* v. *Roberts*. 3 P. Wms. 74.
[3] *Smith* v. *Bruning*, 2 Vern. 392.
[4] *Kent* v. *Allen*, 2 Vern. 588.
[5] *Gale* v. *Lindo*, 1 Vern. 475; *Palmer* v. *Neave*, 11 Ves. 165; *Redman* v. *Redman*, 1 Vern. 348; *Neville* v. *Wilkinson*, 1 Bro. C. C. 543.
[6] *Debenham* v. *Ox*, 1 Ves. 276.

Contracts in general restraint of marriage are void, as against public policy, and the due economy and morality of domestic life; and so if a condition is not in restraint of marriage generally, but still the prohibition is of so rigid a nature, or so tied up to peculiar circumstances, that the party upon whom it is to operate is unreasonably restrained in the choice of marriage, it will fall under the like consideration. Thus, where a legacy was given to a daughter, on condition that she should not marry without consent, or should not marry a man who was not seised of an estate in fee simple of the clear yearly value of £500, it was held to be a void condition, as leading to a probable prohibition of marriage.[1]

Contracts in general restraint of marriage, void.

Contracts in general restraint of trade are universally void, as tending to promote monopolies, and to discourage industry, enterprise, and just competition. But the same reasoning does not apply to a special restraint not to carry on trade at a particular place, or with particular persons, or for a limited reasonable time; and a person may lawfully sell a secret in his trade or business, and restrain himself from using that secret.[2]

Contracts in general restraint of trade, void. But not special restraints.

In like manner agreements which are founded upon violations of public trust or confidence, or of the rules adopted by courts in furtherance of the administration of public justice, are held void.[3] Thus, contracts for the buying, selling, or procuring of public offices,[4] agreements founded on the suppression of criminal prosecutions,[5] contracts which have a teudency to encourage champerty,[6] and generally all agreements founded upon corrupt considerations or moral turpi-

Agreements founded on violation of public confidence. As buying and selling offices.

[1] *Keily* v. *Monck*, 3 Ridg. P. C. 205; *Scott* v. *Tyler*, 2 L. C. 125.

[2] St. 292; *Bryson* v. *Whitehead*, 1 Sim. & Stu. 74; *Benwell* v. *Inns*, 24 Beav. 307; *Harms* v. *Parsons*, 32 Beav. 328.

[3] St. 294.

[4] *Chesterfield* v. *Janssen*, 1 Atk. 352; *Hartwell* v. *Hartwell*, 4 Ves. 811.

[5] *Johnson* v. *Ogilby*, 3 P. Wms. 277.

[6] *Powell* v. *Knowles*, 2 Atk. 224; *Reynell* v. *Sprye*, 1 De G. M. & G. 660.

tude, whether they stand prohibited by statute or not, founded upon corrupt considerations or moral turpitude, whether they stand prohibited by statute or not, are treated as frauds upon public policy or public law.[1]

Neither party to an illegal agreement is aided, as a general rule.

In general, where parties are concerned in illegal agreements, whether they are *mala prohibita*, or *mala in se*, courts of equity, following the rule of law as to participators in a common crime, will not interpose to grant any relief; acting upon the well-known maxim, *In pari delicto potior est conditio defendentis et possidentis.*[2] But in cases where the agreement is repudiated on account of its being against public policy, the circumstance that the relief is asked by a party who is *particeps criminis*, is not in equity material. The reason is, that the public interest requires that relief should be given, and it is given to the public through the party.[3]

Except where agreement is contrary to public policy.

II. Constructive frauds arising from the fiduciary relation.

II. Constructive frauds which arise from some peculiar, confidential, or fiduciary relation between the parties.

In this class of cases there is often to be found some intermixture of deceit, imposition, over-reaching, unconscionable advantage, or other mark of direct fraud. But the principle on which courts of equity act in regard thereto, stands independent of any such ingredients, upon a motive of general public policy. The general principle which governs in all cases of this sort is, that if confidence is reposed, and that confidence is abused, courts of equity will grant relief.

In the first place, as to the relation of parent and child, all contracts and conveyances whereby benefits are secured by children to their parents, or to persons who stand *in loco parentis*, are objects of jealousy,

[1] St. 296.

[2] *Howson* v. *Hancock*, 8 T. R. 575; *Osborne* v. *Williams*, 18 Ves. 379.

[3] St. 298; *St.* 11 Ves. 535; *Roberts* v. *Roberts*, 3 P. Wms. 66; *Smith* v. *Bromley*, Dougl. R. 696; *Rider* v. *Kidder*, 10 Ves. 360.

and if they are not entered into with scrupulous good faith, and are not reasonable under the circumstances, they will be set aside, unless third parties have acquired an interest under them.[1] And where a child, shortly after attaining his majority, makes over property to his father without consideration, or for an inadequate consideration, equity will require the father to show that the child was really a free agent, and had adequate and independent advice.[2] And conversely in a recent Canadian case a deed of gift, executed by a father infirm in mind and body in favour of one of his sons, was ordered to be given up and cancelled.[3]

Gifts from child to parent void if not in perfect good faith.

Gift by child shortly after minority.

By father when infirm in mind and body.

In the next place, as to the relation of guardian and ward. During the existence of guardianship, the relative situation of the parties imposes a general inability to deal with each other. But courts of equity proceed yet further in cases of this sort. They will not permit transactions between guardians and wards to stand, even when they have occurred after the minority has ceased, and the relation becomes thereby actually ended, if the intermediate period be short,[4] unless the circumstances demonstrate the fullest deliberation on the part of the ward, and the most abundant good faith on the part of the guardian.[5]

Guardian and ward cannot deal with each other during the continuance of the relation.

Gift by war soon after the termination of guardianship viewed with suspicion.

Where, however, the influence as well as the legal authority of the guardian over the ward has completely ceased, and the ward has been put in possession of his property after a full and fair settlement of accounts, equity will not interfere to set aside a reasonable gift to the guardian.[6]

Gift upheld when influence and legal authority have ceased.

[1] *Wright* v. *Vanderplank*, 2 K. & J. 1; 8 De G. M. & G. 133; *Baker* v. *Bradley*, 7 De G. M. & G. 597.

[2] *Savery* v. *King*, 5 H. L. Cas. 627; *Davies* v. *Davies*, 4 Giff. 417; *Hannah* v. *Hodgson*, 30 Beav. 19.

[3] *Mason* v. *Seney*, 11 Gr. 447.

[4] *Pierse* v. *Waring*, 1 P. Wms. 121.

[5] St. 317; *Hatch* v. *Hatch*, 9 Ves. 297; *Wright* v. *Vanderplank*, 2 K. & J. 1; 8 De G. M. & G. 133.

[6] *Hylton* v. *Hylton*, 2 Ves. Sr. 549; *Hatch* v. *Hatch*, 9 Ves. 297.

Quasi guardians. Medical advisers. Ministers of religion.

The same principles are applied to persons standing in the situation of *quasi* guardians, or confidential advisers, as medical advisers,[1] or ministers of religion,[2] and to every case where influence is acquired and abused, where confidence is reposed and betrayed.[3]

Solicitor and client.

In the next place, as to the relation between solicitor and client. In *Tomson* v. *Judge*,[4] A., who was proved to have entertained feelings of peculiar personal regard for B., his solicitor, conveyed to him certain real estate by a deed purporting to be a purchase-deed; the consideration was expressed to be £100, the real value being upwards of £1200. B. produced evidence to show that no money passed; that the transaction was never intended to be a purchase, but a gift for his services, and from affection. It was held that the rule is absolute, that a solicitor cannot sustain a gift from his client, made pending the relation of solicitor and client, and the deed was set aside. Kindersley, V.-C., said, "Now, as to the cases of purchases by solicitors from their clients, there is no rule of this court to the effect that a solicitor cannot make such a purchase. A solicitor can purchase his client's property even while the relation subsists; but the rule of the court is that such purchases are to be viewed with great jealousy, and the onus lies on the solicitor to show that the transaction was perfectly fair, that the client knew what he was doing, and in particular that a fair price was given, and of course that no kind of advantage was taken by the solicitor. If the solicitor shows that the transaction was fair and clear, there is no difference between a purchase by him and a stranger. Is the rule with regard to gifts precisely the same, or is it more stringent? Less stringent it cannot be. There is this obvious distinction between

A gift from client to solicitor pending that relation cannot stand. Solicitor may purchase from client, but there must be perfect *bona fides*.

[1] *Dent* v. *Bennett*, 4 My. & Cr. 269.
[2] *Nottidge* v. *Prince*, 2 Giff. 246.
[3] *Smith* v. *Kay*, 7 H. L. Cas. 751; *Lyon* v. *Home*, L. R. 6 Eq. 655.
[4] 3 Drew. 306.

a gift and a purchase. In the case of a purchase, the parties are at arm's length, and each party requires from the other the full value of that which he gives in return. In the case of a gift, the matter is totally different, and it appears to me that there is a far stricter rule established in this court with regard to gifts than with regard to purchases; and that the rule of this court makes such transactions, that is, of a gift from a client to the solicitor, absolutely void." [1]

The rule as to gifts is absolute.

It is an established rule, therefore, that a solicitor shall not in any way whatever, in respect of any transactions in the relation between him and his client, make any gain to himself at the expense of his client, beyond the amount of his just and fair professional remuneration.[2]

Solicitor must make no more advantage than his fair professional remuneration.

An agreement between a solicitor and client that a gross sum shall be paid for costs for business already done is valid. But in this case it behoves the solicitor to use great caution, and to preserve sufficient evidence that it was a fair transaction, and that his client was not under the influence of the pressure arising from the relation of solicitor and client,[3]—a pressure characterised by Lord Thurlow[4] as "the crushing influences of the power of an attorney who has the affairs of a man in his hand." An agreement by a solicitor to receive a fixed sum for costs for future business was formerly invalid, and would have been set aside even after payment under the agreement;[5] but under 33 & 34 Vict., c. 28, s. 4, a solicitor may, subject to certain restrictions, contract with his client as to his remuneration for future services.

Agreement to pay a gross sum for past business is valid.

And for future business under 33 & 34 Vict., c. 28.

[1] *Holman* v. *Loynes*, 18 Jur. 843; *Welles* v. *Middleton*, 1 Cox, 112; *Hatch* v. *Hatch*, 9 Ves. 292; *Spencer* v. *Topham*, 22 Beav. 573; *Gresley* v. *Mousley*, 4 De G. & Jo. 78; *Lewis* v. *Hillman*, 3 H. L. Cas. 630.

[2] *Tyrrell* v. *Bank of London*, 10 H. L. Cas. 26; *O'Brien* v. *Lewis*, 4 Giff. 221; *M'Cann* v. *Dempsey*, 1 Gr. 192.

[3] *Morgan* v. *Higgins*, 1 Giff. 277.

[4] *Welles* v. *Middleton*, 1 Cox, 125.

[5] *In re Newman*, 30 Beav. 196.

Trustee and *cestui que trust.* Trustee must not place himself in a position inconsistent with the interests of the trust. Purchase by trustee from *cestui que trust* cannot be upheld.

In the next place, with regard to the relation of trustee and *cestui que trust*, it may be laid down as a general rule, that a trustee is bound not to do anything which can place him in a position inconsistent with the interests of the trust, or which has a tendency to interfere with his duty in discharging it. It is a consequence of this rule, that a purchase by a trustee from his *cestui que trust*, even although he may have given an adequate price and gained no advantage, shall be set aside at the option of the *cestui que trust;* and as observed by Lord Eldon,[1] "it is founded upon this, that though you may see in a particular case that the trustee has not made advantage, it is utterly impossible to examine, upon satisfactory evidence in the power of the court (by which I mean in the power of the parties), in ninety-nine cases out of a hundred, whether he has made advantage or not. Suppose a trustee buys an estate, and by the knowledge acquired in that character discovers a valuable coal-mine under it, and, locking that up in his own breast, enters into a contract with the *cestui que trust;* if he choose to deny it, how can the court try that against that denial? The probability is, that a trustee who has once conceived such a purpose will never disclose it, and the *cestui que trust* will be effectually defrauded."[2]

Except on a clear and distinct and fair contract, that the *cestui que trust* intended the trustee to purchase.

It has been decided, however, that "a trustee may buy from the *cestui que trust*, provided there is a clear and distinct contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, that the *cestui que trust* intended the trustee should buy; and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee."[3]

[1] *Ex parte Lacey*, 6 Ves. 627.

[2] *Hamilton* v. *Wright*, 9 C. & F. 111, 123-5; *Ingle* v. *Richards*, 28 Beav. 361; *Randall* v. *Errington*, 10 Ves. 423; *Campbell* v. *Walker*, 5 Ves. 682; 13 Ves. 601.

[3] *Coles* v. *Trecothick*, 9 Ves. 234; *Denton* v. *Donner*, 23 Beav. 285.

Trustee may purchase from *cestui que trust*, who is *sui juris*, and has discharged him.

But although it is a general rule that a trustee cannot purchase from himself, as it has been said, there is no objection to his purchasing from his *cestui que trust*, who is *sui juris*, and has discharged him from the obligation which attached upon him as a trustee; but even this transaction will be watched by the court "with infinite and most guarded jealousy."[1]

Gift to trustee treated on same principles as one between guardian and ward.

A trustee is never permitted to partake of the bounty of his *cestui que trust*, except under circumstances which would make the same valid, if it were a case of guardianship.[2] The relation must have in fact ceased, and it must be proved that the influence arising from that relation may be reasonably supposed also to have ceased.

Principal and agent.

In the next place, as to the relation of principal and agent the same principles are generally applicable. Agents are not permitted to become secret vendors or purchasers of property which they are authorised to buy or sell for their principals,[3] or indeed to deal validly with their principals in any case, except where there is the most entire good faith, and full disclosure of all facts and circumstances, and an absence of all undue influence, advantage, or imposition.[4] And if an agent employed to make a purchase, purchase for himself, he will be held a trustee for his principal.[5] Nor will an agent employed to purchase be permitted, unless by the plain and express consent of his principal to make any profit out of the transaction.[6]

Entire good faith and complete disclosure necessary in dealings between principal and agent.

Agent cannot make any secret profit out of his agency.

[1] *Ex parte Lacey*, 6 Ves. 626; *Fox* v. *Mackreth*, 1 L. C. 104.

[2] St. 321.

[3] *Lowther* v. *Lowther*, 13 Ves. 103; *Charter* v. *Trevelyan*, 11 C. & F. 714; *Walsham* v. *Stainton*, 1 De G. J. & S. 678.

[4] St. 315; *Dally* v. *Wonham*, 33 Beav. 154.

[5] *Lees* v. *Nuttall*, 1 Rus. & My. 53; *Taylor* v. *Salmon*, 4 My. & Cr. 134.

[6] *East India Co.* v. *Henchman*, 1 Ves. Jr. 289; *Bentley* v. *Craven*, 18 Beav. 75; *Tyrrell* v. *Bank of London*, 10 H. L. Cas. 26; *Beck* v. *Kantorowicz*, 3 K. & J. 230.

Other cases of confidential or fiduciary relations. Counsel. Auctioneers.

And the principles which apply to trustees, agents, and others, apply with almost equal force to other persons standing in confidential or fiduciary situations, as to counsel, agents, assignees and solicitors of a bankrupt's estate, auctioneers, and creditors who have been consulted as to the sale.[1]

Debtor, creditor, and sureties. Creditor doing or omitting any act to the injury of surety, releases the latter.

Entire good faith is required between debtor and creditor and sureties. And if a creditor does any act affecting the surety; or if he omits to do any act which he is required to do by the surety, or is bound to do, and that act or omission may prove injurious to the surety; or if the creditor enters into any stipulations with the debtor unknown to the surety, and inconsistent with the terms of the original contract, the surety may set up such act, omission, or contract, as a defence to any suit brought against him in law or equity.[2]

III. Constructive frauds, as being unconscientious or injurious to the rights of third parties.

III. Constructive frauds prohibited mainly because they unconscientiously compromit or injuriously affect the private rights, interests, or duties of the parties themselves, or operate substantially as frauds upon the private rights, interests, duties, or intentions of third parties.[3]

Statute of Frauds.

To this class may be referred many of those cases arising under the Statute of Frauds, which requires certain contracts to be in writing to give them validity. In the construction of that statute, a general principle has been adopted, that as it is designed as a protection against fraud, it shall never be allowed to be set up as a protection and support of fraud. Hence, in a variety of cases, where, from fraud, a contract of this sort has not been reduced into writing, but has been suffered to rest in confidence or in parol communica-

Cannot be set up as a protection to fraud.

[1] *Pooley* v. *Quilter*, 2 De G. & Jo. 327; *Carter* v. *Palmer*, 8 C. & Fin. 657; *Ex parte Holyman*, 8 Jur. 156; *Kerr* v. *Bain*, 11 Gr. 423.

[2] Sm. Man. 82; St. 324-326; see also the chapter on Suretyship.

[3] St. 328.

tions between the parties, courts of equity will enforce it against the party guilty of a breach of confidence, who attempts to shelter himself behind the provisions of the statute.[1]

If contract not put into writing through fraud of a party, he cannot set it up as a defence.

Common sailors being so extremely generous, improvident, and credulous, and therefore liable to be imposed upon, equity views their contracts respecting wages and prize-money with great jealousy; and generally grants them relief, whenever any inequality appears in the bargain, or an undue advantage has been taken.[2]

Common sailors.

Bargains with heirs, reversioners, and expectants, during the life of their parents or ancestors, will be relieved against, unless the purchaser can show that a fair price was paid; for fraud in this class of cases is always presumed from inadequacy of price.[3] And this rule is founded on good sense. The very fact of the expectant coming into the market to sell his expectancy, shows that he is not in a position to make his own terms, and that he is more or less in the power of the purchaser; in all such cases, therefore, actual distress need not be proved; a court of equity presumes that there is distress, and that is equivalent to saying, that the party has not that full power of deliberate consent which is essential to a valid contract. The onus therefore lies upon the person dealing with the reversioner or expectant, to show that the transaction is reasonable and *bonâ fide*.

Bargains with heirs and expectants.

The jurisdiction of courts of equity in these cases is not affected by the 32 and 33 Vict., c. 4, which enacts that no purchase, made *bonâ fide*, of a rever-

Jurisdiction under 32 & 33 Vict., c. 4.

[1] St. 330; *Montacute* v. *Maxwell*, 1 P. Wms. 619; *Att.-Gen.* v. *Sitwell*, 1 You. & Coll. Exch. Ca. 583.

[2] St. 332; *How* v. *Wheldon*, 2 Ves. Sr. 516.

[3] *Peacock* v. *Evans*, 16 Ves. 512; *Hincksman* v. *Smith*, 3 Russ. 433.

sionary interest, shall be set aside merely on the ground of under value.[1]

Knowledge of person standing *in loco parentis* does not *per se* make such transactions valid.

It would seem that the fact that the father or other person standing *in loco parentis* was aware of or took part in the transaction does not necessarily make that valid which would otherwise be invalid. It will at the most raise a presumption in favour of the *bonâ fides* of the parties. If, therefore, a father, being unable to supply his son's necessities, assists and protects him in raising money from strangers, the son, in such a case, having in his father's advice presumptively the best security for obtaining the fair market-value of what he sells, the court may perhaps infer that a bargain made under such circumstances was fair and for full value.[2]

Post obits.

It is upon similar principles that *post obit* bonds, and other securities of a like nature, are set aside when made by heirs and expectants. A *post obit* bond is an agreement, on the receipt of money by the obligor, to pay a sum exceeding the sum so received, and the ordinary interest thereof, on the death of the person from whom he, the obligor, expects to become entitled to some property.[3] If in other respects these contracts are perfectly fair, courts of equity will permit them to have effect as securities for the sum to which *ex æquo et bono* the lender is entitled; for he who seeks equity must do equity.[4]

Tradesmen selling goods at extravagant prices.

Where tradesmen and others have sold goods to young and expectant heirs at extravagant prices, and under circumstances demonstrating imposition, or undue advantage, or an intention to connive at secret

[1] *Miller* v. *Cook*, L. R. 10 Eq. 641; *Tyler* v. *Yates*, L. R. 11 Eq. 265; L. R. 6 Ch. 665.

[2] *King* v. *Hamlet*, 2 My. & K. 456; *Talbot* v. *Staniforth*, 1 J. & H. 502; *King* v. *Savery*, 1 Sm. & G. 271; 5 H. L. Cas. 627.

[3] St. 342.

[4] St. 344.

extravagance, courts of equity have reduced the securities, and cut down the claims to their reasonable and just amount.[1]

The party injured may acquiesce after the pressure of necessity has ceased.

In all these cases where, after the pressure of necessity has been removed, the party freely and deliberately, and upon full information, confirms the precedent contract, or other transaction, courts of equity will generally hold him bound thereby; for if a man is fully informed, and acts with his eyes open, he may, by a new agreement, bar himself from relief.[2]

Knowingly producing a false impression to mislead a third party.

Another class of constructive frauds consists of those cases where a man designedly or knowingly produces a false impression on another, who is thereby drawn into some act or contract injurious to his own rights or interests. There can be no real difference between an express representation and one that is naturally or necessarily implied from the circumstances. The wholesome maxim of the law is, that the party who enables another to commit a fraud is answerable for the consequences;[3] and the maxim, *Fraus est celare fraudem*, is, with proper limitations in its application, a maxim of general justice.[4] Thus, if a man having a title to an estate which is offered for sale, and knowing his title, stands by and encourages the sale, or does not forbid it, and thereby another person is induced to purchase the estate, the former so standing by, will be bound by the sale.[5] On the occasion of a loan upon the security of a lease, which the borrower represented himself as entitled to have granted to him for ninety-nine years, the lender required a written intimation from the alleged lessor of his intention to grant the lease. The lessor being apprised of the requisition and its object, signed the required

One who enables another to commit a fraud is answerable.

A man who has a title to property standing by and letting another purchase or deal with it, is bound.

[1] St. 348.
[2] St. 345.
[3] *Rice* v. *Rice*, 2 Drew. 73.
[4] St. 384; *Rodgers* v. *Rodgers*, 13 Gr. 143.
[5] St. 385; *Tcasdale* v. *Teasdale*, Sel. Ch. Cas. 59; *Cawdor* v. *Lewis*, 1 You. & Coll. Ex. Ca. 427.

intimation. The loan was made upon the faith of it, and afterwards the lessor granted a lease, which was then mortgaged by the borrower to the lender. It turned out that the lessor had, some time before, demised the same premises for the same term to the borrower, by whom it had since been assigned for value. It was held that the court had jurisdiction to direct repayment by the lessor to the lender for the sum which he had advanced, with interest, although the lessor was not shown to have been guilty of any fraud, or of having done more than forgotten the previous lease when he granted the second.[1]

Even though there be no fraud, but only forgetfulness.

Agreements at auctions not to bid against one another.

Agreements whereby parties engage not to bid against each other at a public auction, especially where the same is directed or required by law, are held void, for they are unconscientious, and have a tendency to cause the property to be sold at an undervalue. On the other hand, if underbidders or puffers are employed at an auction to enhance the price, and to deceive other bidders, and they are in fact misled, the sale will be held void as against public policy.[2] But now by 30 and 31 Vict., c. 48, s. 6, the vendor, if he reserves to himself the right in the particulars or conditions of sale, may bid in person or by one agent at the sale.[3]

Puffer at sale by auction.

Under 30 & 31 Vict., c. 48.

Fraud upon consenting creditors to a composition deed.

If a creditor who is party to a composition deed has obtained a secret and undue advantage as a condition of signing the deed, and thus decoyed other innocent and unsuspecting creditors into signing the deed of composition, which they supposed to be founded upon the basis of entire equality and reciprocity among all the creditors, it is a fraud upon the policy of the law.[4] And such secret arrangements are utterly void, even

[1] *Slim* v. *Croucher*, 1 De. G. F. & Jo. 518.
[2] St. 293; Sugd. V. & P. 9.
[3] *Gilliat* v. *Gilliat*, L. R. 9 Eq. 60.
[4] St. 378.

as against the assenting debtor or his sureties, and money paid under them is recoverable back.[1]

A person obtaining a donation must always be prepared to prove *bona fides*.

In every transaction where a person obtains by donation a benefit from another to the prejudice of that other person, and to his own advantage, it is essential, if the transaction should afterwards be questioned, that he should prove that the donor voluntarily and deliberately performed the act, knowing its nature and effect.[2] And on this principle the cases have recently gone so far as to show that the donee, under a voluntary settlement, where no power of revocation is reserved, has thrown upon him the onus of showing that the settlement was intended by the donor to be irrevocable.[3]

A power must be exercised *bona fide* for the end designed.

Secret agreement in fraud of object of power.

"No point is better established, than that a person having a power must exercise it *bona fide* for the end designed, otherwise it is corrupt and void."[4] Hence when a parent, having a power of appointment among his children, appoints to one or more of them, to the exclusion of the others, upon a bargain for his own advantage, equity will relieve against the appointment on the ground of fraud, as where there is a secret understanding that the child should assign a part of the fund to a stranger,[5] or to the father's debtors.[6] So again if a parent, having a power to raise portions for children, and even to fix the time when they are to be raised, appoint to a child during infancy, and while not in want of a portion, especially if the death of the child at the time of the appointment be expected, he will not be allowed, on the child's death, to derive any

Appointment by a father to a sickly infant.

[1] St. 379 ; *Mare* v. *Sandford*, 1 Giff. 288.

[2] *Cooke* v. *Lamotte*, 15 Beav. 240 ; *Anderson* v. *Elsworth*, 3 Giff. 154.

[3] *Coutts* v. *Acworth*, L. R. 8 Eq. 558 ; *Wollaston* v. *Tribe*, L. R. 9 Eq. 44.

[4] *Aleyn* v. *Belchier*, 1 L. C. 344.

[5] *Daubeny* v. *Cockburn*, 1 Mer. 626.

[6] *Farmer* v. *Martin*, 2 Sim. 502 ; *Carver* v. *Richards*, 1 De G. F. & Jo. 548 ; *Salmon* v. *Gibbs*, 3 De G. & Sm. 343.

benefit from the appointment as the personal representative of that child.[1]

Doctrine of illusory appointments.

Formerly where a person having a power of appointing property among the members of a class, although with full discretion as to the amount of their respective shares, exercised that power by appointing to one or more of the objects a merely nominal share, such an appointment, though valid at law, was set aside as an illusory appointment, not being exercised *bonâ fide* for the end designed by the donor.[2] In consequence of the great difficulty and conflict of authority, as to what might be deemed a nominal or illusory share, the legislature interfered, and established in effect that no appointment shall be invalid on the ground merely that an unsubstantial, nominal, or illusory share of the property has been appointed to the objects of the power.[3]

Abolished by 1 Will. IV., c. 46.

A man representing a certain state of facts as inducement to a contract, cannot derogate from it by his own act.

"A man who has induced another to enter into a contract with him by representing an actual state of things as a security for the enjoyment of an interest which he has himself created for valuable consideration, is not at liberty by his own act to derogate from that interest by determining the state of things which he so held forth as the consideration for entering into the contract."[4]

[1] *Hinchinbroke* v. *Seymour*, 1 Bro. C. C. 394; *Wellesley* v. *Mornington*, 2 K. & J. 143.

[2] *Wilson* v. *Piggott*, 2 Ves. Jr. 351.

[3] 1 Will. IV., c. 46; 1 Sugd. on Pow. 545.

[4] *Piggott* v. *Stratton*, Johnson 341; 1 De G. F. & J. 33.

CHAPTER V.

SURETYSHIP.

Cases in which the peculiar remedies afforded by courts of equity constitute the principal ground of jurisdiction are the second great head of the concurrent jurisdiction.

Suretyship. Utmost good faith required between all parties.

The contract of suretyship requires that the utmost good faith be observed between all the parties to it; for they do not deal with one another at arm's length as in ordinary contracts. Any concealment of material facts, or any express or implied misrepresentation of such facts, or any undue advantage taken of the surety by the creditor, either by surprise, or by withholding proper information, will undoubtedly furnish a sufficient ground to invalidate the contract.

What concealment of facts by creditor releases surety.

It is a question even now not quite settled as to what concealment of facts—what degree of *suppressio veri*— by the creditor is necessary to annul the obligation of the contract of suretyship. Thus Story lays down broadly,[1] that "if a party taking a guarantee from a surety conceals from him facts which go to increase his risk, and suffers him to enter into the contract under false impressions as to the real state of facts, such concealment will amount to fraud;" but this sweeping statement of the rule is by no means supported by decided cases, which very much narrow the ground of the doctrine, and seem to point to the conclusion, "that the only ground for rescinding the contract for concealment of facts is that the party con-

[1] St. 215.

The fact must have been one which the creditor was under an obligation to discover.

Hamilton v. *Watson.*

cealing them must have been under some obligation to disclose them." The principles by which the courts are governed are well illustrated in the important case of *Hamilton* v. *Watson.*[1] There A. became indebted to the B. Company to the amount of £750; the B. Company amalgamated with the G. Company, which took on itself the rights and liabilities of the former. On the G. Company calling on A. for payment of the debt due from him, A. entered into a bond, with H. as a surety, by which a new cash account should be opened with the G. Company to the amount of £750, H. not being informed of the previous debt. A week after the date of the bond, A. drew out a draft upon the new account with the G. Company for the whole £750 for which H. had become bound, and paid off with it the old debt due to the B. Company. It was held that this was not a sufficient concealment of facts to discharge the surety—that the mere circumstance of the parties supposing that the money was intended to be applied to a particular purpose did not appear to vitiate the transaction at all—that the creditor was under no obligation to volunteer a disclosure of any transaction that passed between him and the other party—that if the surety would guard against particular perils, he must put the question and gain the information required—and that the true criterion as to whether any disclosure ought to be made voluntarily, was to inquire whether there was anything that might not naturally be expected to take place between the parties—that is, whether there was a contract between the debtor and creditor to the effect that his position should be different from that which the surety might naturally expect.

True criterion —was there anything that might not naturally be expected to take place between the parties.

Rule as to concealment in insurance inapplicable to guaranties.

It has been finally decided that the rule which governs insurances as to concealment of facts does not apply to guaranties—that, in insurances on ships or lives,

[1] 12 Cl. & Fin. 109.

the rule, that if the assured conceal any material facts known to him, even though without fraud, the policy is vitiated, is peculiar to the nature of such contracts, in which, in general, the assured knows, and the underwriter does not know, the circumstances of the voyage or the state of health.[1]

Concealment of material fact, part of the immediate transaction.

But although the law is so far liberal in its rule as to what facts a creditor is bound to disclose, there are cases with regard to which it is difficult to lay down any general rule—where it has been held that a concealment of a material fact, part of the immediate transaction, will discharge the surety. Thus, in *Pidcock* v. *Bishop*,[2] it was agreed between the vendors and the vendee of goods that the latter should pay 10s. per ton beyond the market price in liquidation of an old debt due to one of the vendors. The payment of the goods was guaranteed by a third party in the following words:—"I will guaranty you in the payment of £200 value, to be delivered to Tickell, in Lightmoor pig-iron." The private bargain between the parties was not communicated to the surety. It was held that this was a fraud on the surety—that a party giving a guarantee ought to be informed of any private bargain between the vendor and vendee which might have the effect of varying his responsibility—that the effect of the transaction would be to compel the vendor to appropriate to the payment of the old debt a portion of those funds which the surety might reasonably suppose would go towards defraying the debt for the payment of which he had made himself collaterally liable, and that such a bargain therefore increased his responsibility.[3]

Surety ought to be informed of private bargain between vendor and vendee, varying his responsibility.

Although, therefore, it is a general rule that, though

[1] *North British Insurance Co.* v. *Lloyd*, 10 Exch. 523; *Wythes* v. *Labouchere*, 3 D. G. & Jo. 593.

[2] 3 B. & C. 605.

[3] *Maltby's Case*, cited 1 Dow Parl. Cas. 294.

Creditor must inquire as to circumstance of suretyship, if there is ground to suspect fraud has been practised on surety.

a creditor is not bound to inquire into the circumstances under which a third party becomes a surety for a debt to such a creditor, he will be bound to inquire when the dealings between the parties are such as would reasonably create a suspicion that a fraud is being practised upon the surety. In *Owen* v. *Homan*,[1] A. being largely indebted to B. & Company, and being on the verge of bankruptcy, brought them, on different occasions, bills, &c., signed by himself and the defendant, who was his aunt, as surety. The defendant was, to the knowledge of B. & Company, a married woman, aged 75, and living apart from her husband. It was held that the circumstances were such as reasonably to create a suspicion of fraud in the minds of the bankers—that they could not shelter themselves under the plea that they were not called on to ask and did not ask any questions on the subject—that, in such cases, wilful ignorance is not to be distinguished in its equitable consequences from knowledge.[2]

Rights of creditor against surety regulated by the instrument of guaranty.

The rights of the creditor, as against the principal debtor, may or may not depend upon the instrument of guaranty; but the rights of the creditor as against the surety are wholly regulated by the terms of that instrument. When an obligation exists only in virtue of a covenant, its extent can be measured only by the words in which it is conceived.[3] In all cases, therefore, where a surety is bound by a joint-bond, the court will not reform the joint-bond so as to make it several, upon the presumption of a mistake from the nature of the transaction; but it will require positive proof of an express agreement by the surety that it should be several as well as joint.[4]

Joint-bond not made several as against a surety. Except in case of mistake clearly proved.

It would seem, notwithstanding some dicta to the

[1] 4 H. L. Cas. 997.

[2] *Maitland* v. *Irving*, 15 Sim. 437.

[3] *Sumner* v. *Powell*, 2 Mer. 35, 36.

[4] *Rawstone* v. *Parr*, 3 Russ. 539; St. 164; 9 Ves. 124.

contrary,[1] that a surety cannot compel the creditor to proceed against the debtor, and practically there is no hardship in the case; for at any moment after the debt becomes payable, the surety may himself pay off the creditor, and proceed against the debtor for the money so paid.[2]

Surety cannot compel creditor to proceed against debtor, *semble*.

But, on the other hand, a surety has a right to come into equity, to take proceedings in the nature of *quia timet*, to compel the debtor to pay the debt when due, whether the surety has actually been sued on it or not; for it is "unreasonable that a man should always have a cloud hanging over him."[3] But this right only arises where the creditor has a right to sue his debtor, and refuses to exercise that right.[4]

Surety can compel debtor to pay the debt when due.

Where the surety pays the debt on behalf of the principal debtor, the rule, whether at law[5] or in equity, is that he has a right to call upon such debtor for reimbursement. And this right may be put upon the ground of an implied contract on the part of the debtor to repay the money so paid on his account, where there is no express promise creating the right.[6]

Surety paying debt entitled to reimbursement from debtor.

If, in addition to the security given by the surety, the creditor has taken some additional or collateral securities from the principal debtor, courts of equity have held that upon payment of the debt by the surety to the creditor, the surety is entitled to have the benefit of all those collateral securities thus given by the debtor to the creditor. Thus, for example, if at the time when the bond of the principal and surety is given, a mortgage is also made by the principal to

If creditor has taken collateral securities from debtor, surety on paying the debt is entitled to them.

[1] *Bailey* v. *Edwards*, 12 W. R. 337.
[2] St. 327; *Wright* v. *Simpson*, 6 Ves. 733.
[3] *Ranelaugh* v. *Hayes*, 1 Vern. 189; Mitford on Plead. 172; *Antrobus* v. *Davidson*, 3 Mer. 569.
[4] *Padwick* v. *Stanley*, 9 Hare, 627.
[5] *Toussaint* v. *Martinnant*, 2 T. R. 105.
[6] *Craythorne* v. *Swinburne*, 14 Ves. 162.

the creditor as an additional security for the debt, there, if the surety pays the debt, he will be entitled to have an assignment of the mortgage, and to stand in the place of the mortgagee.[1] But this general rule did not apply to such securities as got back upon payment to the principal debtor, and were, in fact, extinguished by the payment. Such was the case of a bond entered into by the principal debtor and surety to the creditor: on payment by the surety, the obligation on the bond ceased to exist, and consequently the surety could not stand in the shoes of the creditor as to that bond.[2] But by the Mercantile Law Amendment Act,[3] this exception has been abolished, and a surety is now entitled to have assigned to him every judgment, specialty, or security which shall be held by the creditor in respect of such debt, whether such judgment, &c., shall or shall not at law be deemed to have been satisfied by the payment of the debt.

Except formerly, such securities as were extinguished by payment.

Exception abolished by 19 & 20 Vict., c. 97, s. 5.

Where a debt is secured by the suretyship of two or more persons, and one surety pays the whole or part of the debt, he has in equity, and to a certain extent also in law, a right to contribution from his co-surety; and this doctrine of "contribution is bottomed and fixed on general principles of justice, and does not spring from contract, though contract may qualify it."[4] Hence it follows that the doctrine of contribution applies whether the parties are bound in the same or different instruments, provided they are co-sureties for the same principal and in the same engagement, even though they are ignorant of the mutual relation of suretyship; and further, there is no difference if they are bound in different sums, except that the contribution could not be required

A surety paying debt can compel co-sureties to contribute. Contribution in equity grounded on general justice, and not on implied contract.

[1] St. 499; *Hodgson* v. *Shaw*, 3 My. & Keen, 190.

[2] *Copis* v. *Middleton*, 1 T. & R. 229; *Hodgson* v. *Shaw*, 3 My. & K. 190.

[3] 19 & 20 Vict., c. 97, s. 5.

[4] *Dering* v. *Winchelsea*, 1 L. C. 92.

beyond the sum for which they had become bound.[1] Under the same circumstances there can be no right to contribution at law, for there that right is founded on a contract, express or implied.

At law contribution is founded on contract.

In other respects also, the jurisdiction at common law is less beneficial than in equity. Thus where there are several sureties, and one becomes insolvent, the surety who pays the entire debt can in equity compel the solvent sureties to contribute towards payment of the entire debt;[2] but at law he can recover only an aliquot part of the whole, regard being had to the number of co-sureties.[3] Suppose, for instance, there are three sureties, and one of them becomes insolvent, if one of the remaining solvent sureties pays the debt, he may in equity compel the other solvent surety to contribute a moiety; at law he can only recover one-third in any case, from the solvent co-surety. It seems, however, that if one of the sureties dies, contribution can be enforced against his representatives, both at law and in equity.[4]

Different effects of insolvency of one surety, at law and in equity.

Contribution against representatives of a deceased surety.

Before equitable pleas were allowed at common law, where it did not appear on the face of the instrument that a person was a surety; if, for instance, in a bond the principal debtor and surety were bound jointly and severally, parol evidence was inadmissible at law to show that he was only a surety;[5] but in equity parol evidence was always admissible for that purpose.[6] Such evidence is now admissible at law under an equitable defence.[7]

Parol evidence to show that apparent principal was surety, now allowed at law.

[1] *Dering* v. *Winchelsea*, 1 L. C. 89; *Whiting* v. *Burke*, L. R. 6 Ch. 342.

[2] *Hitchman* v. *Stewart*, 3 Drew. 271; *Mayor of Berwick* v. *Murray*, 7 De G. M. & G. 497.

[3] *Cowell* v. *Edwards*, 2 B. & P. 268; *Batard* v. *Hawes*, 2 Ell. & B. 287.

[4] *Primrose* v. *Bromley*, 1 Atk. 88; *Batard* v. *Hawes*, 2 Ell. & B. 287.

[5] *Lewis* v. *Jones*, 4 B. & C. 506.

[6] *Craythorne* v. *Swinburne*, 14 Ves. 160, 170; *Clarke* v. *Henty*, 3 Y. & C. Ex. Ca. 187.

[7] *Pooley* v. *Harradine*, 7 Ell. & B. 431; *Taylor* v. *Burgess*, 5 H. & N. 1.

Surety may limit his liability by express contract.

Although the doctrine of contribution is founded upon the general equity of the case, and not upon contract, still a person may take himself out of the operation of that doctrine by express contract. Thus, where three persons became sureties, and agreed among themselves that if the principal debtor failed to pay the debt, they would pay their respective parts; one became insolvent, and one of the remaining solvent sureties having paid the whole debt, was held entitled to recover only one-third from the other solvent surety.[1]

Surety can only charge debtor for what he actually paid.

Where a surety discharges an obligation at a less sum than its full amount, he cannot, as against his principal, make himself a creditor for the whole amount, but can only claim what he has actually paid in discharge of the debt.[2]

The surety will be discharged if creditor varies contract with debtor without his privity.

But a surety will be discharged from his liability, where by acts subsequent to the contract for suretyship his position has been essentially charged without his consent. Thus, where a person gave a promissory-note as a surety, upon an agreement that the amount should be advanced to the principal debtor, by draft at three months' date, and the creditor, without the concurrence of the surety, paid the amount at once; it was held that the agreement had been varied, and the surety was therefore discharged.[4]

Or if creditor give time in a binding manner to debtor without consent of surety.

"If a creditor, without the consent of the surety, gives time to the principal debtor, by so doing he discharges the surety; that is, if time is given by virtue of *positive contract* between the creditor and

[1] *Swain* v. *Wall*, 1 Ch. R. 149; *Craythorne* v. *Swinburne*, 14 Ves. 165.

[2] *Reed* v. *Norris*, 2 My. & Cr. 361, 375.

[3] *Bonser* v. *Cox*, 6 Beav. 110; *Calvert* v. *Lond. Dock Co.*, 2 Keen, 638; *Evans* v. *Bremridge*, 2 K. & J. 174; 8 De G. M. & G. 101.

the principal—not where the creditor is merely inactive. And the surety is held to be discharged for this reason, because the creditor by giving time to the principal has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not, and because he in fact cannot have the same remedy against the principal as he would have had under the original contract."[1]

Surety not released if his rights are accelerated—*semble.*

It seems, however, that a surety will not be discharged by giving time if his remedies against the creditor are not diminished or affected, and especially if they are accelerated.[2]

If creditor, giving time, reserve his rights against surety, the latter is not discharged.

Nor will the surety be discharged if the creditor, on giving further time to the principal debtor, *reserve* his right to proceed against the surety; "for when the right is reserved, the principal debtor cannot say it is inconsistent with giving him time that the creditor should be at liberty to proceed against the sureties, and that they should turn round upon the principal debtor, notwithstanding the time so given him; for he was a party to the agreement by which that right was reserved to the creditor, and the question whether or not the surety is informed of the arrangement is wholly immaterial."[3] And the rule is the same when the principal debtor is released, but the creditor reserves his rights against the surety.

But where the release is in general terms, the surety will be discharged, and that not from any

[1] *Samuell* v. *Howarth*, 3 Mer. 272; *Wright* v. *Simpson*, 6 Ves. 734; *Rees* v. *Berrington*, 2 L. C. 887; *Bailey* v. *Edwards*, 4 B. & S. 771; *Davies* v. *Stainbank*, 6 De G. M. & G. 679.

[2] *Hulme* v. *Coles*, 2 Sim. 12; *Prendergast* v. *Devey*, 6 Mad. 124; *Price* v. *Edmunds*, 10 B. & C. 578.

[3] *Webb* v. *Hewitt*, 3 K. & J. 442; *Boulbee* v. *Stubbs*, 18 Ves. 26; *Wyke* v. *Rogers*, 1 De G. M. & G. 408.

A simple release of the principal discharges the surety.

equity in his favour, but on principles of bare justice to the principal debtor. For "it would be a fraud on the principal debtor to profess to release him, and then to sue the surety, who in his turn would sue him; but where the bargain is that the creditor is to retain his remedy against the surety, there is no fraud on the principal debtor." [1]

Release of one surety, even through a mistake of law, releases co-sureties.

It seems to be a settled principle at law that a release or discharge of one surety by the creditor, even when founded on a mistake of law, operates as a discharge of the others.[2]

But not if release is taken as a covenant not to sue.

But though a release of one surety is a discharge of his co-sureties, still if the release can be construed as a *covenant not to sue*, it will not operate as a discharge of the co-sureties.[3]

Creditor, giving time, cannot reserve his rights against surety, if he *release* the debtor.

Although a creditor upon giving time to the principal may reserve his right against the sureties, he cannot do so if he give to the debtor what amounts to an actual release, for the debt is gone at law. It was therefore held where there was an agreement between a bond debtor and his creditor that the latter should take all the debtor's property, and should pay his other creditors five shillings in the pound; that though it was not a discharge of the bond at law by way of accord and satisfaction, because not under seal, still that it operated in equity as a satisfaction of the debt, and that it was not possible in equity upon such a transaction to reserve any rights against the surety; and that any attempt to do so would be void, as inconsistent with the agreement.[4]

[1] Per Mellish, L. J., in *Nevill's Case*, L. R. 6 Ch. 47.

[2] *Cheetham* v. *Ward*, 1 B. & P. 633; *Nicholson* v. *Revell*, 4 A. & E. 675.

[3] *Price* v. *Barker*, 4 Ell. & Bl. 777; *Bailey* v. *Edwards*, 4 B. & S. 761.

[4] *Webb* v. *Hewitt*, 3 K. & J. 438; *Nicholson* v. *Revell*, 4 Ad. & Ell. 675; *Kearsley* v. *Cole*, 16 Mees. & W. 128.

A surety is entitled on payment of the debt to all the securities which the creditor has against the principal, whether such collateral securities were given at the time of the contract of suretyship, with or without the knowledge of the surety;[1] or it seems whether they were given after that contract, with or without the knowledge of the principal.[2] In all these cases, therefore, if a creditor who has had, or ought to have had, such collateral securities, loses them, or suffers them to get back into the possession of the debtor, or does not make them effectual by giving proper notice,[3] the surety, to the extent of such security, will be discharged.[4] So where a creditor, by neglecting the statutory formalities, lost the benefit of an execution under a warrant of attorney, which, according to the agreement of suretyship, he had proceeded to enforce, upon a notice by the surety, it was held that the surety was thereby discharged.[5]

Surety on payment is entitled to *all* securities which creditor has against debtor.

Surety released if creditor loses or allows securities to go back into creditor's hands.

[1] *Mayhew* v. *Crickett*, 2 Swanst. 185.

[2] *Pearl* v. *Deacon*, 24 Beav. 186; 1 De G. & Jo. 461; *Lake* v. *Bruttton*, 18 Beav. 34; 8 De G. M. & G. 440; *Pledge* v. *Buss*, Johnson, 663, 668.

[3] *Strange* v. *Fooks*, 4 Giff. 408.

[4] *Capel* v. *Butler*, 2 S. & S. 457; *Law* v. *E. I. Co.*, 4 Ves. 824.

[5] *Watson* v. *Allcock*, 1 Sm. & Giff. 319; 4 De G. M. & G. 242; *Mayhew* v. *Crickett*, 2 Swanst. 185, 190.

CHAPTER VI.

PARTNERSHIP.

Partnership.

Equity has a practically exclusive jurisdiction.

COURTS of equity now exercise a full concurrent jurisdiction with courts of law in all matters of partnership; and indeed it may be said that, practically speaking, they exercise an exclusive jurisdiction over the subject in all cases of any complexity or difficulty. For in all cases where a discovery, an account, a contribution, an injunction, or a dissolution is sought in cases of partnership, or even where a due enforcement of partnership rights, duties, and credits is required, the remedial justice administered by courts of equity is far more complete, extensive, and various, adapting itself to the particular nature of the grievance, and granting relief in the most beneficial and effectual manner, where no redress whatsoever, or very imperfect redress, could be obtained at law.[1]

Equity decrees specific performance of agreement to enter into partnership for a definite time, where acts of part performance.

A court of equity will decree the specific performance of a contract to enter into partnership for a fixed and definite period of time;[2] but it will not do so when no term has been fixed, for such decree would be useless when either of the parties might dissolve the partnership immediately afterwards.[3] Nor, as it appears, will it decree specific performance, unless there have been acts of part performance.[4]

Equity enforces articles of partnership.

In like manner, after the commencement and during the continuance of the partnership, courts of

[1] St. 666, 683.

[2] *Buxton* v. *Lister*, 3 Atk. 385; *England* v. *Curling*, 8 Beav. 129.

[3] *Hercy* v. *Birch*, 9 Ves. 357; Mr Swanston's Note to *Crawshay* v. *Maule*, 1 Swanst. 511–513.

[4] *Scott* v. *Rayment*, L. R. 7 Eq. 112.

equity will in many cases interpose to decree a specific performance of other agreements in the articles of partnership. If, for instance, there be an agreement to insert the name of a partner in the name of the firm, so as to clothe him publicly with all the rights of acting for the partnership, and there be a studied, intentional, prolonged, and continued inattention to the application of the partner to have his name so used and inserted in the firm name, courts of equity will grant a specific relief by an injunction against the use of any other firm name, not including his name. But the remedy in such cases is strictly confined to cases of studied delay and omission, and relief will not be given for a temporary, accidental, or trifling omission.[1]

Injunction against omission of name of one of the partners.

So where there is an agreement by the partners not to engage in any other business, courts of equity will act by injunction to enforce it; and if profits have been made by any partner in violation of such an agreement in any other business, the profits will be decreed to belong to the partnership.[2] A court of equity will further interfere by injunction to prevent such acts on the part of any of the partners, as either tend to the destruction of the partnership property,[3] or to impose an improper liability on the others, or to the exclusion of the other partners from the exercise of their partnership rights, whether those rights be founded on the law relating to partnerships in general, or on agreement,[4] and although no dissolution is prayed.[5]

Injunction against carrying on another business.

Injunction against destruction of partnership property, or exclusion of partner.

But it is not to be inferred that courts of equity will in all cases interfere to enforce a specific performance of the articles of partnership. Where the remedy at law is entirely adequate, no relief will be

Courts of equity will not enforce specific performance of articles where remedy at law is entirely adequate.

[1] *Marshall* v. *Colman*, 2 J. & W. 266, 269.

[2] St. 667; *Somerville* v. *Mackay*, 16 Ves. 382, 387, 389; *England* v. *Curling*, 8 Beav. 129.

[3] *Miles* v. *Thomas*, 9 Sim. 606, 609; *Marshall* v. *Watson*, 25 Beav. 501.

[4] *Deitrichssen* v. *Cabburn*, 2 Ph. 59.

[5] *Hall* v. *Hall*, 12 Beav. 414.

granted in equity; and where the stipulation, though not against the policy of the law, yet is an effort to divest the ordinary jurisdiction of the common tribunals of justice, such as an agreement, in case of any disputes, to refer the same to private arbitration, courts of equity will not, any more than courts of law, interfere to enforce that agreement.[1] But since the passing of the Common Law Procedure Act 1854, courts, both of law and of equity, have shown an inclination to enforce agreements for reference under that Act, and to remit parties to their chosen forum.[2]

Nor of an agreement to refer to arbitration, unless under Common Law Procedure Act 1854.

Dissolution of partnership.

A partnership may be dissolved in various ways.[3]

1. By operation of law.

1. By operation of law. Of events on which by operation of law the partnership is determined, the principal seem to be, the death of one of the partners, unless there be an express stipulation to the contrary;[4] the bankruptcy of all or one of the partners;[5] the conviction of any one of them for felony;[6] or a general assignment by one or more of the partners, whether the partnership be determinable at will, or, it seems, even where it is for a definite period.[7] To these may, perhaps, be added any event which makes either the partnership itself, or the objects for which it was formed, illegal.[8] In these cases, the partnership determines by operation of law from the happening of the particular event, without any option of any of the parties.

[1] *Street* v. *Rigby*, 6 Ves. 815; *British Emp. Shipping Co.* v. *Somes*, 3 K. & J. 433.

[2] *Seligmann* v. *De Boutillier*, L. R. 1 C. P. 681; *Willisford* v. *Watson*, 20 W. R. 32.

[3] See generally Dixon on Partnership, 430-446.

[4] *Gillespie* v. *Hamilton*, 3 Mad. 251; *Crawshay* v. *Maule*, 1 Swanst. 495.

[5] *Barker* v. *Goodair*, 11 Ves. 83, 86; *Crawshay* v. *Collins*, 15 Ves. 228.

[6] 2 Bl. Com. 409; Co. Litt. 391 *a*.

[7] *Heath* v. *Sansom*, 4 B. & Ad. 172; *Nerot* v. *Burnard*, 4 Russ. 247.

[8] *Esposito* v. *Bowden*, 7 E. & B. 763, 785; Dixon on Partnership, 431, 432.

2. By agreement of parties. By mutual agreement of *all* the partners, the partnership, though for an unexpired term, may be put an end to.[1] 2. By agreement of parties.

Any member of an ordinary partnership, the duration of which is indefinite, may dissolve it at any moment he pleases; and the partnership will then be deemed to continue only so far as may be necessary for the purposes of winding up its then pending affairs.[2] But at the same time, it is apprehended that the Court of Chancery would restrain an immediate dissolution and sale of the partnership property, if it appeared that irreparable mischief would ensue from such a proceeding.[3] Partnership at will may be dissolved at any moment.

A partnership may also expire by the efflux of the time fixed upon by the partners for the limit of its duration.[4] Dissolution by event provided for.

But in the case of a partnership for a term, if after the term, the business be carried on as before, instead of being wound up according to the terms of the articles, or by sale as required by law in the absence of special provisions, the partnership will continue, and will be deemed a partnership at will upon the terms of the original partnership, so far as those terms are applicable.[5] Partnership continuing after term agreed on, is a partnership at will, on old terms.

3. Dissolution by decree of a court of equity. A court of equity will, in many cases, decree a dissolution at the instance of a partner, though he cannot by his own act dissolve the partnership. 3. By decree of court.

(*a.*) A partnership may be dissolved from its com-

[1] *Hall* v. *Hall*, 12 Beav. 414.
[2] *Peacock* v. *Peacock*, 16 Ves. 50.
[3] Lindley on Partnership, 226; St. 668; *Blisset* v. *Daniel*, 10 Hare, 493; see Pothier Partn. s. 150.
[4] *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298-307.
[5] *Parsons* v. *Hayward*, 31 Beav. 199; 31 L. J. Ch. 666.

Partnership induced by fraud.

mencement, where it originated in fraud, misrepresentation, or oppression.[1]

Gross misconduct and breach of trust.

(*b.*) If one partner grossly misconducts himself in reference to partnership matters, acting in breach of the trust and confidence between the partners, this will be a ground for dissolution.[2]

Continual breaches of contract.

(*c.*) So, if there have been continual breaches of the partnership contract by one of the parties, as if he have persisted in carrying on the business in a manner totally different from that agreed on, the court will dissolve the partnership.[3] But there must be a substantial failure in the performance of the agreement on the part of the defendant; it is not the office of a court of equity to enter into a consideration of mere partnership squabbles.[4]

Wilful and permanent neglect of business.

If a partner who ought to attend to the business wilfully and permanently absents himself from it, or becomes so engrossed in his private affairs as to be unable to attend to it, this would seem, independently of agreement, to be a ground for dissolution.[5]

Mere disagreement or incompatibility of temper not a ground for dissolution. Unless it be such as to make it impossible to carry on the business.

But the court will not dissolve a partnership merely on account of the disagreement or incompatibility of temper of the partners, where there has been no breach of the contract.[6] If, however, the disagreements are so great as to render it impossible to carry on the business, all mutual confidence being destroyed, there cannot be a doubt that the court will dissolve the partnership.[7]

[1] *Rawlins* v. *Wickham*, 1 Giff. 355; 7 W. R. 145; *Hue* v. *Richards*, 2 Beav. 305.

[2] *Smith* v. *Jeyes*, 4 Beav. 503; *Harrison* v. *Tennant*, 21 Beav. 482.

[3] *Waters* v. *Taylor*, 2 V. & B. 299.

[4] *Wray* v. *Hutchinson*, 2 My. & K. 235; *Anderson* v. *Anderson*, 25 Beav. 190.

[5] *Harrison* v. *Tennant*, 21 Beav. 482; *Smith* v. *Mules*, 9 Hare, 556.

[6] *Goodman* v. *Whitcomb*, 1 J. & W. 589, 592; *Jauncey* v. *Knowles*, 29 L. J. Ch. 95.

[7] *Baxter* v. *West*, 1 Dr. & Sm. 173; *Watney* v. *Wells*, 30 Beav. 56; *Leary* v. *Shout*, 33 Beav. 582.

Insanity of partner.

Whenever a partner, who is to contribute his skill and industry in carrying on the business, or who has a right to a voice in the partnership, becomes permanently insane, a court of equity will dissolve the partnership.[1] Insanity of a partner is not, however, in the absence of agreement, *ipso facto* a dissolution, but is only a ground for dissolution by decree of the court.[2]

Account on dissolution. Receiver appointed only in case of dissolution.

Where a dissolution has taken place, an account will not only be decreed, but, if necessary, a manager or receiver will be appointed to close the partnership business, and make sale of the partnership property, so that a final distribution may be made of the partnership effects; but he will not be appointed except with a view to dissolution.[3]

Account where no dissolution is prayed.

As to decreeing an account where no dissolution is intended or prayed, the general rule would seem to be, that where a partner has been excluded, or the conduct of the other party has been such as would entitle the complaining partner to a dissolution as against him, a general account, at any rate up to the time of filing the bill, will be decreed; but that in no case will a continuous account be decreed, as that would be, in part at least, a carrying on of the business by the Court of Chancery.[4]

A partnership, though in a certain sense expiring on any of the events that have been mentioned—such as death, effluxion of time, or bankruptcy of a partner—does not expire to all purposes; for all the partners are interested in the business until all the affairs of

[1] *Waters* v. *Taylor*, 2 V. & B. 303; *Patey* v. *Patey*, 5 L. J. Ch. N. S. 198; *Anon.* 2 K. & J. 441; *Rowlands* v. *Evans*, 30 Beav. 302.

[2] *Jones* v. *Noy*, 2 My. & K. 125.

[3] St. 672; *Hall* v. *Hall*, 3 Mac. & G. 79; *Baxter* v. *West*, 28 L. J. Ch. 169.

[4] Dixon on Partnership, 193; St. 671; *Loscombe* v. *Russell*, 4 Sim. 8; *Fairthorne* v. *Weston*, 3 Hare, 387.

Partner making advantage out of the partnership property, a trustee for other partners.

the partnership have been finally settled by all.[1] Hence, the partners thus continuing a business are accountable to the rest, not merely for the ordinary profits, but for all the advantages which they have obtained in the course of the business.[2]

Courts of equity preferable to those of law.

In equity land bought for partnership purposes is money.

There are other considerations which make a resort to a court of equity, instead of a court of law, not only a more convenient, but also an indispensable instrument for the purposes of justice. Thus, real estate may be bought and held for the purposes of the partnership, and really be a part of the stock-in-trade. In this case, whatever be the form of conveyance, the real estate thus purchased will, in equity, though not at law, be deemed personalty to all intents and purposes, and subject to all the equitable rights and liens of the partners and their creditors, which would apply to it were it personal estate, and so to pass to the personal representatives of a deceased partner; unless, perhaps, there be a clear and determinate expression of the deceased partner, that it shall go to his heir-at-law beneficially.[3]

And personal representatives will take.

Creditors may, on decease of one partner, go against survivors, or against the estate of deceased.

In cases of partnership debts, on the decease of one partner, the creditors may, at their option, pursue their legal remedies against the survivor, or resort in equity to the estate of the deceased, and this altogether without regard to the state of the accounts between the partners themselves, or to the ability of the survivors to pay.[4]

The liability of partners, although sometimes called joint and several, differs in important particulars from

[1] *Crawshay* v. *Collins*, 2 Russ. 344.

[2] *Clements* v. *Hall*, 2 De G. & J. 173; *Willett* v. *Blandford*, 1 Hare, 253; *Wedderburn* v. *Wedderburn*, 22 Beav. 84; 2 Sp. 208.

[3] St. 674; *Darby* v. *Darby*, 3 Drew. 495; *Bone* v. *Pollard*, 24 Beav. 283; *Wylie* v. *Wylie*, 4 Gr. 278.

[4] *Baring* v. *Noble*, 2 R. & My. 495.

a joint and several liability. Thus, although the separate estate of the deceased is liable, yet it is liable only as for a joint debt; consequently the separate creditors of the deceased are entitled to be paid their debts in full, before the creditors of the partnership can claim anything from his separate estate.[1] Hence, a creditor of the partnership, who is also a debtor to the deceased, cannot, in an administration of the deceased's estate, set off his separate debt against the joint debt due to him.[2]

Separate creditors paid out of separate estate before partnership creditors.

On the other hand, the creditors of the partnership have a right to the payment of their debts, out of the partnership funds, before the private creditors of the partners. But this preference is, at law, generally disregarded; in equity it is worked out through the equity of the partners over the whole fund.[3]

Partnership creditors paid their debts out of partnership funds before separate creditors.

Another illustration of the beneficial result of equity jurisdiction, in cases of partnership, may be found in the case of two firms dealing with each other, where some or all of the partners in one firm are partners with other persons in the other firm. Upon the technical principles of the common law in such cases no suit can be maintained at law in regard to any transactions or debts between the two firms.[4] But there is no difficulty in proceeding in courts of equity to a final adjustment of all the concerns of both firms, in regard to each other; for, in equity, it is sufficient that all parties in interest are before the court as plaintiffs, or as defendants, and they need not, as at law, in such a case, be on the opposite sides of the record. In equity all contracts and dealings

Two firms having a common partner cannot sue one another at law, but may in equity.

[1] *Gray* v. *Chiswell*, 9 Ves. 118; *Ridgway* v. *Clare*, 19 Beav. 111; *Ex parte Wilson*, 3 M. D. & De G. 57.

[2] *Stephenson* v. *Chiswell*, 3 Ves. 566.

[3] St. 675; *Twiss* v. *Massey*, 1 Atk. 67; *Campbell* v. *Mullett*, 2 Swanst. 574.

[4] *Bosanquet* v. *Wray*, 6 Taunt. 597.

between such firms, of a moral and legal nature, are deemed obligatory, though void at law. Courts of equity, in such cases, look behind the form of the transactions to their substance, and treat the different firms, for the purposes of substantial justice, exactly as if they were composed of strangers, or were, in fact, corporate companies.[1]

At law, one partner cannot sue his co-partners in a partnership transaction—he may in equity.

Upon similar grounds one partner cannot, at law, maintain a suit against his co-partners to recover the amount of money which he has paid for the partnership, since he cannot sue them without suing himself also, as one of the partnership,[2] but he may do so in equity.

[1] *Mainwaring* v. *Newman*, 2 B. & P. 120; St. 679, 680; *De Tastet* v. *Shaw*, 1 B. & A. 664.

[2] *Wright* v. *Hunter*, 5 Ves. 792; *Bovill* v. *Hammond*, 6 B. & C. 151; *Sedgwick* v. *Daniell*, 2 H. & N. 319; *Atwood* v. *Maude*, L. R. 3 Ch. 369.

CHAPTER VII.

ACCOUNT.

I. Account. I. ACCOUNT was one of the most ancient forms of action at the common law. But the modes of proceeding in that action, although aided from time to time by statutable provisions, were found so very dilatory, inconvenient, and unsatisfactory, that as soon as courts of equity began to assume jurisdiction in matters of account, as they did very early, the remedy at law began to decline, and has gradually fallen into disuse.[1]

At common law and inconvenient.

When account lay at law. At the common law an action of account lay in two classes of cases.[2]

1. In cases of privity of deed or law. 1. Where there was either a privity in deed by the consent of the party, as against a bailiff, a receiver appointed by the party; or a privity in law, *ex provisione legis*, as against a guardian in socage,[3] and their executors and administrators.[4]

2. Between merchants. 2. By the law merchant, one naming himself a merchant, might have an account against another, naming him as a merchant, and charge him as a receiver,[5] or against his executors.[6]

And the reasons for the disuse of the action of account at common law, and its progress in equity,

[1] St. 442.
[2] St. 445.
[3] Co. Litt. 90 *b*.
[4] 3 & 4 Anne, c. 16. Co. Litt. 172 *a*.; 11 Co. R. 89.
[5] 13 Edw. III., c. 23.

Suitors preferred equity, because of its powers of discovery and of administration.

are not hard to find—one ground was, that courts of common law could not compel a discovery from the defendant on his oath; another ground was that the machinery and administrative powers of the courts of common law were not so well adapted for the purposes of an account as those of the courts of equity.[1]

In what cases equity allows an account.

Courts of common law having failed to give due relief in cases of account, suitors were obliged, in most cases, to come into equity for that purpose. It now becomes necessary to examine in what cases equity will afford such relief.

1. Principal against agent.

1. Equity will assume jurisdiction where there exists a fiduciary relation between the parties; as in favour of a principal against his agent, though not in favour of the agent against the principal. The rule is thus stated by Sir J. Leach:[2]—"The defendants here were agents for the sale of the property of the plaintiff, and wherever such a relation exists a bill will lie for an account; *the plaintiffs can only learn from the discovery of the defendants how they have acted in the execution of their agency.*"

Cestui que trust against trustee.

Cases of account between trustees and *cestui que trust* may properly be deemed confidential agencies, and are peculiarly within the appropriate jurisdiction of courts of equity; the same rule applies here as in other cases of agency.[3]

Agent cannot have an account against his principal.

It has been argued that if the principal may file a bill against his agent, the agent may file a bill against his principal; but the rights of principal and agent are not co-relative. The right of the principal rests upon the trust and confidence reposed in the agent,

[1] St. 451.

[2] *Mackenzie* v. *Johnston*, 4 Mad. 373.

[3] *Docker* v. *Somes*, 2 My. & Keen. 664.

but the agent reposes no such confidence in the principal.[1]

2. It seems that equity will assume jurisdiction where there are mutual accounts between the plaintiff and defendant. 2. Cases of mutual accounts between plaintiff and defendant.

As to what are mutual accounts, the best definition is to be found in the judgment in *Phillips* v. *Phillips*,[2] "I understand a mutual account to mean not merely where one of the two parties has received money and paid it on account of the other, but where each of two parties has received and paid on the other's account. I take the reason of that distinction to be, that in the case of proceedings at law, where each of the two parties has received and paid on account of the other, what would be to be recovered would be the balance of the two accounts; and the party plaintiff would be required to prove, not merely that the other party had received money on his account, but also to enter into evidence of his own receipts and payments—a position of the case which, to say the least, would be difficult to be dealt with at law. Where one party has merely received and paid moneys on account of the other, it becomes a simple case. The party plaintiff has to prove that the moneys have been received, and the other party has to prove his payments. The question is only as to the receipts on one side and payments on the other, and it is a mere question of set-off; but it is otherwise where each party has received and paid.[3] "Mutual accounts"—where each of two parties has received and paid on the other's account. No account if it is a mere question of set-off.

3. A bill for an account will lie where there are circumstances of great complication. As to what is the criterion of the amount of complication necessary 3. Circumstances of great complication.

[1] *Padwick* v. *Stanley*, 9 Hare, 627; *Smith* v. *Leveaux*, 33 L. J. Ch. 167.

[2] 9 Hare, 471.

[3] *Padwick* v. *Hurst*, 18 Beav. 575; *Fluker* v. *Taylor*, 3 Drew. 183.

to give jurisdiction to a court of equity, independently of any other circumstances, the judgment of Lord Redesdale in *O'Connor* v. *Spaight*,[1] is in point:—"The ground on which, I think, that this is a proper case for equity is, that the account has become so complicated that a court of law would be incompetent to examine it upon a trial at *nisi prius* with all necessary accuracy. . . . This is a principle on which courts of equity constantly act, by taking cognisance of matters which, though cognisable at law, are yet so involved with a complex account that it cannot properly be taken at law." But this principle is not quite settled;[2] and it is by no means to be taken as a universally conclusive criterion, especially as the common law judges have a special power conferred on them by the Procedure Act of 1854,[3] on a cause coming on at *nisi prius* to compel a reference to arbitration. And the suggested rule, therefore, cannot, perhaps, be put higher than this—that the difficulty of examining the accounts at *nisi prius* will be a strong circumstance in favour of a resort to the aid of equity. In short, the equity to an account must be judged from the nature and facts of each particular case.[4]

The test is—Can the accounts be examined on a trial at *Nisi Prius?*

Compulsory reference to arbitration by 17 & 18 Vict., c. 125, s. 3.

Matters of defence to suit for an account. Settled account.

It is ordinarily a good bar to a suit for an account that the parties have already, in writing, stated and adjusted the items of the account, and struck the balance.[5] In such a case a court of equity will not interfere, for, under such circumstances, an *indebitatus assumpsit* lies at law, and there is no ground for resorting to equity. If, therefore, there has been an account stated, that may be set up by way of plea, as

[1] 1 Sch. & Lefr. 305.

[2] *Taff Vale Rail. Co.* v. *Nixon*, 1 H. L. Cas. 111; *South Eastern Rail. Co.* v. *Martin*, 2 Phill. 758; 1 Hall & Twells, 69; *Phillips* v. *Phillips*, 9 Hare, 475.

[3] 17 & 18 Vict., c. 125, s. 3.

[4] *Phillips* v. *Phillips*, 9 Hare, 475; *South East. Rail. Co.* v. *Martin*, 2 Phill. 758; 1 Hall & Twells, 69.

[5] *Dawson* v. *Dawson*, 1 Atk. 1.

a bar to all discovery and relief, unless some matter is shown which calls for the interposition of a court of equity. But if there has been any mistake, or omission, or accident, or fraud, or undue advantage, by which the account stated is in truth vitiated, and the balance is incorrectly fixed, a court of equity will not suffer it to be conclusive upon the parties, but will, in some cases, direct the whole account to be opened, and taken *de novo*. In other cases, where the mistake or omission, or inaccuracy, or fraud, or imposition, is not shown to affect or stain all the items of the transaction, the court will content itself with allowing the account to stand, with liberty to the plaintiff to surcharge and falsify it—the effect of which is to leave the account in full force, as a stated account, except so far as it can be impugned by the opposing party, who has the burden of proof on him to establish errors and mistakes. The showing an omission, for which credit ought to be given, is a surcharge; the proving an item to be wrongly inserted is a falsification. The *onus probandi* is always on the party having liberty to surcharge and falsify.[1] And this liberty to surcharge and falsify includes an examination not only of errors of fact, but of errors of law.[2] What shall constitute, in the sense of a court of equity, a stated or settled account, is in some measure dependent on the circumstances of each case. An acceptance of an account may be express, or it may be implied, from circumstances. Acquiescence in stated accounts, even though for a long time, although it amounts to an admission or presumption of their correctness, does not of itself establish the fact of the account having been settled.[3]

Equity will open the whole account if there be mistake or fraud.

In other cases particular items only will be examined.

"Surcharge."

"Falsify."

What is a stated or settled account?

The court is generally unwilling to open a settled account, especially after a long time has elapsed, except

[1] *Pitt* v. *Cholmondeley*, 2 Ves. Sr. 565.

[2] St. 523–25.

[3] St. 528; *Hunter* v. *Belcher*, 2 De G. J. & S. 194, 202.

Court unwilling to open a settled account except as against a trustee.

in cases of apparent fraud. But in cases of settled accounts between trustee and *cestui que trust*, and other persons standing in confidential relations to one another, where *mala fides* is alleged, there is scarcely any length of time that will prevent the court from opening the account altogether.[1]

[1] St. 527, 523 *n.*; *Matthews* v. *Wallwyn*, 4 Ves. 125; *Todd* v. *Wilson*, 9 Beav. 486.

CHAPTER VIII.

SET-OFF AND APPROPRIATION OF PAYMENTS.

I. SET-OFF. "Natural equity says that cross demands should compensate each other, by deducting the less sum from the greater: and that the difference is the only sum which can be justly due."[1] But the common law refused to carry out this principle of justice, and held that where there were mutual debts unconnected, they should not be set-off, but each must sue. The natural sense of mankind was first shocked at this in the case of bankrupts, and accordingly the legislature interfered, and allowed a set-off at common law in this and a few other cases.[2]

I. Set-off.

At law, no set-off in case of mutual unconnected debts.

As to connected accounts of debt and credit, it is certain that both at law and in equity, and without any reference to the statutes, or the tribunal in which the cause is depending, the same general principle prevails, that the balance of the accounts only is recoverable; which is, therefore, a virtual adjustment and set-off between the parties.[3]

As to connected accounts, balance recoverable both at law and equity.

It is true that equity generally follows the law as to set-off, but it is with limitations and restrictions. If there is no connection between the demands, then the rule is as at law; but if there is a connection between the demands, equity acts upon it, and allows a set-off under particular circumstances.[4]

If demands are connected, equity sometimes interposes.

[1] *Green* v. *Farmer*, 4 Burr. 2220.

[2] 4 Ann. c. 17, s. 11; 2 Geo. II., c. 22, s. 13; 8 Geo. II., c. 24, s. 4.

[3] *Dale* v. *Sollet*, 4 Burr. 2133; St. 1434.

[4] St. 1434; *Rawson* v. *Samuel*, 1 Cr. & Ph. 161, 172, 173.

Set-off in equity, in the case of mutual independent debts where there is mutual credit.

In the first place, then, it would seem, independently of the statutes of set-off, courts of equity, in virtue of their general jurisdiction, are accustomed to grant relief in all cases, where, although there are mutual and independent debts, yet there is a mutual credit between the parties founded at the time upon the existence of some debts due by the crediting party to the other. By mutual credit, in the sense in which the terms are here used, we are to understand a knowledge, on both sides, of an existing debt due to one party and a credit by the other party, founded on and trusting to such debt as a means of discharging it.[1] Thus, for example, if A. should be indebted to B. in the sum of £10,000 in a bond, and B. should borrow of A. £2000 on his own bond, the bonds being payable at different times, the nature of the transaction would lead to the presumption that there was a mutual credit between the parties as to the £2000, as an ultimate set-off, *pro tanto*, from the debt of £10,000. Now, in such a case, a court of law could not set-off these independent debts against each other; but a court of equity would not hesitate to do so, upon the ground either of the presumed intention of the parties, or of what is called a natural equity.[2]

No set-off in such a case at law.

Mutual equitable debts, or a legal debt on one side, and equitable debt on the other, where there is mutual credit as to such debts.

In the next place, as to equitable debts, or a legal debt on one side, and an equitable debt on the other, there is great reason to believe that, whenever there is a mutual credit between the parties touching such debts, a set-off is, upon that ground alone, maintainable in equity; although the mere existence of mutual debts, without such mutual credit, might not, even in a case of insolvency, sustain it.[3] But the mere existence of cross demands will not be sufficient to justify a set-off in equity.[4] Indeed, a set-off is ordinarily

[1] *Ex parte Prescott*, 1 Atk. 230.
[2] St. 1435; *Lanesborough* v. *Jones*, 1 P. Wms. 326; *Jeffs* v. *Wood*, 2 P. Wms. 128.
[3] *James* v. *Kynnier*, 5 Ves. 110; *Piggott* v. *Williams*, 6 Mad. 95.
[4] *Rawson* v. *Samuel*, 1 Cr. & Ph. 161.

Mere cross demands are not sufficient for equity to interpose. Party seeking set-off must show some equitable ground.

allowed in equity only when the party, seeking the benefit of it, can show some equitable ground for being protected against his adversary's demand—the mere existence of cross demands is not sufficient. *A fortiori* a court of equity will not interfere on the ground of an equitable set-off to prevent a party recovering a sum awarded to him for damages for breach of contract, merely because there is an unsettled account between him and the other party, in respect to dealings arising out of the same contract.[1]

In cross demands which, if recoverable at law, would be a subject of set-off, equity relieves.

However, where there are cross demands between the parties of such a nature that, if both were recoverable at law, they would be the subject of a set-off, then, if either of the demands be a matter of equitable jurisdiction, the set-off will be enforced in equity.[2] As, for example, if a legal debt is due to the defendant by the plaintiff, and the plaintiff is the assignee of a legal debt due to a third person from the plaintiff, which has been duly assigned to himself, a court of equity will set off the one against the other, if both debts could properly be the subject of set-off at law.[3]

No set-off of debts accruing in different rights.

In the next place, courts of equity following the law will not allow a set-off of a joint debt against a separate debt, or, conversely, of a separate debt against a joint debt; or, to state the proposition more generally, they will not allow a set-off of debts accruing in different rights;[4] and, therefore, where an executor and trustee of a legacy, who was also the residuary legatee, had become the creditor of the husband and administrator of the deceased legatee, he was not, in the absence of any special agreement, allowed to set-off his debt

[1] St. 1436; *Rawson* v. *Samuel*, 1 Cr. & Ph. 161.

[2] *Clarke* v. *Cost*, 1 Cr. & Ph. 154.

[3] St. 1436 *a.*; *Williams* v. *Davies*, 2 Sim. 461.

[4] St. 1437.

against the legacy, to which the husband, having survived his wife the legatee, was as such administrator entitled.[1]

Except under special circumstances, as fraud.

But special circumstances may occur creating an equity which will justify the interposition of the court, even where the cross demands exist in different rights. Thus, in *Ex parte Stephens*,[2] bankers were directed to lay out money in certain annuities, in the name and to the use of S. They did not do so, but, representing that they had, made entries and accounted for the dividends accordingly. S. afterwards, relying on their representations, gave a joint and several promissory-note, with her brother, to the bank, to secure his private debt to them. The bankers afterwards failed, and their assignees in bankruptcy sued the brother alone. A petition was then presented by S. and her brother, praying that the petitioners might be at liberty to set off what was due on the note against the debt due by the bankrupts to S., that she might prove for the residue, that the note might be delivered up, and the assignees might be restrained from suing upon it; and it was accordingly so decreed.[3]

II. Appropriation or imputation of payments.

II. Appropriation of payments. Questions as to the appropriation, or, as it is termed in the Roman law, the imputation of payments, arise in this mode. Suppose a person owing another several debts makes a payment to him, the question then arises, to which of these debts shall such payment be appropriated or imputed—a matter often of considerable importance, not only to the debtor and creditor, but sometimes also to third persons. For instance, suppose A. owes to B. two distinct sums of £100 and £100, and A. could set up the Statute of Limitations as a defence to an action for the earlier of

[1] *Freeman* v. *Lomas*, 9 Hare, 109; *Lambarde* v. *Older*, 17 Beav. 542.

[2] 11 Ves. 24.

[3] *Vulliamy* v. *Noble*, 3 Mer. 593; *Ex parte Hanson*, 12 Ves. 346; 18 Ves. 232; *Cawdor* v. *Lewis*, 1 You. & Coll. Exch. C. 427, 433.

the two debts, but not to an action brought for the other, it is clear that if A. paid £100 to B., and that payment could be imputed to the earlier debt, B. could still recover from him another £100; whereas if it were appropriated to the later debt, he would be without remedy as to the earlier. Again, suppose A. owes B. two sums of £500, for the first of which C. is a surety; if A. pays B. £500, and it is imputed to the first £500, C.'s liability will cease; if it be imputed to the other £500, the liability will with the debt still remain.[1]

Debtor has first right to appropriate payments to which debt he chooses, at time of payment.

The first rule upon the subject of appropriation is, that the debtor has a right to appropriate any payments which he makes to whatever debt, due to his creditor, he may choose to apply it, but the debtor must exercise this option *at the time of making the payment.*[2] And the intention of the person making the payment may not only be manifested by him in express terms,[3] but it may be inferred from his conduct at the time of payment, or from the nature of the transaction.[4]

If debtor omit, the creditor may make appropriation to what debts he chooses.

In the next place, where the debtor has himself made no special appropriation of any payment, then the creditor is at liberty to apply that payment to any one or more of the debts which the debtor owes him;[5] and it seems that the creditor need not make an immediate appropriation of it, but may do so at any time before the action.[6] This privilege of the creditor, however, must be taken with this limitation, that he has not a right to apply a general payment to

[1] *Clayton's Case*, 1 Mer. 572; Tudor's L. C. Merc. Law, 17.

[2] St. 459 *c.*; *Anon.* Cro. Eliz. 68.

[3] *Ex parte Imbert*, 1 De G. & Jo. 152.

[4] *Young* v. *English*, 7 Beav. 10; *Att.-Gen. of Jamaica* v. *Manderson*, 6 Moo. P. C. C. 239, 255; *Buchanan* v. *Kerby*, 5 Gr. 332.

[5] St. 459 *b.*; *Lysaght* v. *Walker*, 5 Bligh N. S. 1, 28; *Re Brown*, 2 Gr. 111, 590.

[6] *Philpott* v. *Jones*, 4 Nev. & Man. 16; 2 Ad. & Ell. 44; *Simson* v. *Ingham*, 2 B. & C. 65.

But not to an illegal debt.

any item of account which is itself illegal and contrary to law.[1]

Or where payment is in the nature of a composition.

And where A. was indebted to B. on several accounts, and a payment had been made, as for the first instalment of a composition on the several debts; but the arrangement subsequently broke down, owing to the non-payment of the other instalments; it was held that it was not open to either party subsequently to appropriate the payment to any specific debt; but that from the nature of the transaction, it must be deemed to have been paid in respect of all the debts rateably.[2]

Creditor may appropriate to a debt barred by the statute. But his appropriation will not revive a debt already barred.

Where there are two debts, one of them barred by the Statute of Limitations, and a payment is made by the debtor without appropriating the payment, the creditor may appropriate it towards satisfaction of the debt already barred; but such an appropriation will have no operation to revive a debt already barred.[3] It has been decided also that where there are several debts, some of which are barred, if a payment is made on account of principal or interest generally, the effect of it will be to take out of the operation of the statute any debt which is not barred at the time of payment, but that it will not revive a debt which is then barred; and the inference will be that the payment is to be attributed to those not barred.[4]

A general payment by debtor takes a debt not already barred out of the statute, but does not revive a barred debt.

If neither debtor nor creditor make the appropriation, the law makes it.

If neither debtor nor creditor has made any appropriation, then the law will appropriate the payment, it seems, to the earlier, and not, as the Roman law does, to the more burdensome debt.[5]

[1] *Wright* v. *Laing*, 3 B. & C. 165; *Ribbans* v. *Crickett*, 1 B. & P. 264.

[2] *Thompson* v. *Hudson*, L. R. 6 Ch. 320.

[3] *Mills* v. *Fowkes*, 5 Bing. N. C. 455.

[4] *Nash* v. *Hodgson*, 6 De G., M. & G. 474.

[5] *Mills* v. *Fowkes*, 5 Bing. N. C. 455. See Pothier Oblig. by Evans, *n.* 528–535; 561–572.

This rule receives its most frequent application in cases of running accounts between parties, where there are various items of debts on one side, and various items of credit on the other side, occurring at different times, as in a banking account. In *Clayton's case*,[1] on the death of D., a partner in a banking firm, there was a balance of £1713 in favour of C., who had a running account with the firm. After the death of D., the surviving partners became bankrupt; but, before their bankruptcy, C. had drawn out sums to a larger amount than £1713, and had paid in sums still more considerable. It was held that the sums drawn out by C. after the death of D. must be appropriated to the payment of the balance of £1713 then due, and that consequently the estate of D. was discharged from the debt due from the firm at his death, the sums subsequently paid in by C. constituting a new debt, for which the surviving members of the firm were alone liable. In such a case, the sums paid to the creditor are deemed to be paid upon the general blended account, and go to extinguish *pro tanto* the balance of the old firm, in the order of the earliest items thereof. "In such a case, there is no room for any other appropriation, than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle all accounts current are settled, and particularly cash accounts. When there has been a continuation of dealings, in what way can it be ascertained whether the specific balance due on a given day has or has not been discharged, but by examining whether payments to the amount of that balance

Cases of running account in partnerships.

Clayton's Case.

The sum first paid in is presumed to be first drawn out.

[1] 1 Mer. 585.

The account is not to be taken backwards, and the balance struck at the head instead of the foot.

appear by the account to have been made. You are not to take the account backwards, and strike the balance at the head, instead of the foot of it. A man's banker breaks, owing him on the whole account a balance of £1000. It would surprise one to hear the customer say, 'I have been fortunate enough to draw out all that I paid in during the last four years; but there is £1000 which I paid in five years ago, that I hold myself never to have drawn out, and therefore if I can find anybody who was answerable for the debts of the banking house such as they stood five years ago, I have a right to say that it is that specific sum which is still due to me, and not the £1000 that I paid in last week.'"[1]

[1] Judgments in *Clayton's Case*, 1 Mer. 608, 609; *Palmer's Case*, 1 Mer. 623, 624; *Sleech's Case*, 1 Mer. 539.

CHAPTER IX.

SPECIFIC PERFORMANCE.

Breach of contract at common law a question of damages.

By the common law every executory contract to sell or transfer a thing is treated as a merely personal one, and, if left unperformed by the party, no redress can be had except in damages; thus allowing the party the election either to pay damages or to perform the contract at his sole pleasure. But courts of equity have deemed such a course wholly inadequate for the purposes of justice, and they have not hesitated to interpose and require from the conscience of the offending party a strict performance of what he cannot, without manifest fraud or wrong, refuse.[1]

In equity contract must be exactly performed.

Inadequacy of remedy at law, ground of equity jurisdiction.

The ground of this jurisdiction being the inadequacy of the remedy at law, it follows as a general principle that where damages at law will give a party the full compensation to which he is entitled, and will put him in a position as beneficial to him as if the agreement had been specifically performed, equity will not interfere.[2]

There are, however, certain cases where equity refuses to interfere to compel specific performance without taking into consideration the question whether adequate relief can be obtained at law, or not.

Equity will not decree specific performance of an illegal or immoral contract.

The court will not decree specific performance of an agreement to do an action immoral or contrary to the law. As expressed by Sir William Grant, "You cannot stir a step but through the illegal agreement, and

[1] St. 714. [2] *Harnett* v. *Yeilding*, 2 Sch. & Lef. 553.

Or of an agreement without consideration.

it is impossible for the court to enforce it."[1] So again, a court of equity will not enforce specific performance of an agreement without consideration. In *Jefferys* v. *Jefferys*,[2] a father, by voluntary settlement, having *actually* conveyed certain freeholds, and *covenanted* to surrender certain copyholds to trustees in trust for his daughters, afterwards devised part of the same estates to his widow, who, on his death, was admitted to some of the copyholds. A suit was instituted by the daughters to have the trusts of the settlement carried out. The Lord Chancellor said, "The title of the plaintiffs to the freehold is complete; and they may have a decree for carrying the settlement into effect so far as the freeholds are concerned. With respect to the copyholds, I have no doubt that the court will not execute a voluntary contract."

Nor of a contract which the court cannot enforce. Where personal skill is required.

The incapacity of a court to compel the complete execution of a contract in certain cases, limits its jurisdiction to compel specific performance. This principle is most frequently illustrated in cases of agreements to do acts involving personal skill, knowledge, or inclination. Thus, in *Lumley* v. *Wagner*,[3] a lady agreed in writing with a theatrical manager to sing at his theatre for a definite period. By a clause subsequently agreed to by her, she engaged not to use her talents at any other theatre or concert-room, without the written authorisation of the manager. The lady engaged with the manager of a rival theatre within the defined period. It was held that though the court would restrain the lady from singing at any other theatre, it could not compel her to sing at the theatre of the plaintiff according to her agreement.[4] It is on the same principle that the court refuses

[1] *Thomson* v. *Thomson*, 7 Ves. 470; *Ewing* v. *Osbaldiston*, 2 My. & Cr. 53.

[2] Cr. & Ph. 141.

[3] 5 De G. & Sm. 485; 1 De G., M. & G. 604.

[4] *Martin* v. *Nutkin*, 2 P. Wms. 266; *Dietrichsen* v. *Cabburn*, 2 Phil. 52.

Specific performance of contract to transfer good-will of a business alone refused.

specific performance of an agreement for the sale of the good-will of a business unconnected with the business premises, by reason of the uncertainty of the subject-matter, and the consequent incapacity of the court to give specific directions as to what is to be done to transfer it.[1]

Contracts to build or repair not enforced. Because the remedy at law is adequate.

Again, it seems to be now settled that the court will not interfere in cases of contracts to build or repair. "There is no case of a specific performance decreed of an agreement to build a house, because if A. will not do it B. may. A specific performance is only decreed where the party wants the thing *in specie*, and cannot have it any other way."[2] In the case of building contracts the plaintiff has an adequate, perhaps a better, remedy in damages.[3] Another reason for the refusal of courts of equity to decree specific performance of agreements to build is, that such contracts are for the most part too uncertain to enable the court to carry them out.[4] It seems, however, that where such an agreement is clear and definite in its nature, the court might without much difficulty entertain a suit for its performance.[5] So again, the court will not enforce a contract which is in its nature revocable, for its interference in such a case would be idle, inasmuch as what it had done might be instantly undone by either of the parties. It is on this principle that the court generally refuses to interfere in cases of agreements to enter into partnership, which do not specify the duration of the partnership,—that relation, unless otherwise provided, being dissoluble at the will of either party.[6]

And because they are generally too uncertain.

Revocable contract will not be enforced.

[1] *Baxter* v. *Conolly*, 1 J. & W. 576; *Darbey* v. *Whittaker*, 4 Drew. 134, 139, 140.

[2] *Errington* v. *Aynesly*, 2 Bro. C. C. 343.

[3] *South Wales Railway Co.* v. *Wythes*, 1 K. & J. 186; 5 De G., M. & G. 880.

[4] *Mosely* v. *Virgin*, 3 Ves. 184.

[5] *Mosely* v. *Virgin*, 3 Ves. 184; *Baumann* v. *James*, L. R. 3 Ch. 508; St. 728.

[6] *Hercy* v. *Birch*, 9 Ves. 357; *Sturge* v. *Mid. Rail. Co.*, 6 W. R. 233.

Mutuality of remedy must generally exist.

Where the specific performance of a contract will be decreed upon the application of one party, courts of equity will maintain the like suit at the instance of the other party, although the relief sought by him is merely in the nature of a compensation in damages or value; for in all such cases the court acts upon the ground that the remedy, if it exists at all, ought to be mutual and reciprocal, as well for the vendor as the purchaser.[1] It follows, therefore, that an infant cannot sustain a bill for specific performance, for a court of equity will not compel a specific performance as against him.[2] An apparent exception is that arising under the Statute of Frauds, where a plaintiff may obtain a decree for specific performance of a contract signed by the defendant, although not signed by the plaintiff, who if sued on his part would not have been liable. But such "cases are supported, first because the Statute of Frauds[3] only requires the agreement to be signed by the party to be charged; and next, it is said that the plaintiff by the act of filing the bill has made the remedy mutual. Neither of these reasons apply to the case of an infant. The act of filing the bill by his 'next friend,' cannot bind him."[4]

Infant therefore cannot compel specific performance.

Statute of Frauds an exception.

Division of subject.

Having premised these general observations, it is proposed to treat the subject under two heads, with regard to—

I. Contracts respecting chattels personal.
II. Contracts respecting land.

No essential difference between realty and personalty.

In making this distinction, however, it is necessary to remember that courts of equity decree the specific performance of contracts, not upon any distinction

[1] St. 723; *Adderley* v. *Dixon*, 1 S. & S. 607.
[2] *Flight* v. *Bolland*, 4 Russ. 301.
[3] 29 Car. II. c. 3.
[4] *Flight* v. *Bolland*, 4 Russ. 301.

between realty and personalty, but because damages at law may not in the particular case afford a complete remedy. Thus a court of equity decrees performance of a contract for land, not because of the real nature of the land, but because damages at law, which must be calculated upon the general money value of land, may not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value. So a court of equity will not generally decree performance of a contract for the sale of stock or goods, not because of their personal value, but because damages at law, calculated upon the market price of the stock or goods, are as complete a remedy to the purchaser as the delivery of the stock or goods contracted for; inasmuch as with the damages he may purchase the same quantity of the like stock or goods.[1]

Contracts as to realty enforced because remedy at law is inadequate.

Secus—contracts concerning personalty where the legal remedy as a rule is adequate.

I. Contracts respecting personal chattels.

1. Contracts respecting personal chattels. Not generally enforced.

The general rule now is, not to entertain jurisdiction in equity for a specific performance of agreements respecting goods, chattels, stock, choses in action, and other things of a merely personal nature.[2] But this rule is qualified and subject to certain exceptions; or rather the rule is limited to cases where a compensation in damages furnishes a complete and satisfactory remedy.[3]

Are damages at law an adequate compensation?

Thus, in *Duncuft* v. *Albrecht*,[4] the Vice-Chancellor, in decreeing specific performance of an agreement for the sale of a certain number of shares in a railway company, said—"Now, I agree that it has long since been decided that you cannot have a bill for the specific performance of an agreement to transfer a certain quantity of stock. But, in my opinion, there

Contract respecting shares in a railway company enforced.

[1] *Adderley* v. *Dixon*, 1 S. & S. 610.
[2] *Pooley* v. *Budd*, 14 Beav. 34.
[3] St. 718.
[4] 12 Sim. 199.

is not any sort of analogy between a quantity of three per cents., or any other stock of that description, (which is always to be had by any person who chooses to apply for it in the market,) and a certain number of railway shares of a particular description, which railway shares are limited in number, and which, as has been observed, are not always to be had in the market."[1]

Such shares are limited in number.

In *Buxton* v. *Lister*,[2] Lord Hardwicke puts the case of a ship-carpenter purchasing timber which was peculiarly convenient to him, by reason of its vicinity, and also the case of an owner of land, covered with timber, contracting to sell his timber, in order to clear his land, and assumes that, as in both these cases, damages would not, by reason of the special circumstances, be a complete remedy, equity would decree a specific performance.[3]

Sale of assigned debts under a bankruptcy enforced at suit of vendor.

In *Adderley* v. *Dixon*,[4] the plaintiffs having purchased and taken assignments of certain debts which had been proved under two commissions of bankruptcy, agreed to sell them to the defendant for 2s. 6d. in the pound, a specific performance of the agreement at the suit of the vendor was enforced, and the learned Vice-Chancellor said—"The present case, being a contract for the sale of the uncertain dividends which may become payable from the estates of the two bankrupts, it appears to me that a court of equity will decree specific performance, because damages at law cannot accurately represent the value of the future dividends; and to compel this purchaser to take such damages would be to compel him to sell those dividends at a conjectural price. It is true that the present bill is not filed by the purchaser, but by the vendor, who

[1] *Doloret* v. *Rothschild*, 1 Sim. & Stu. 598; *Shaw* v. *Fisher*, 2 De G. & Sm. 11.

[2] 3 Atk. 385.

[3] *Adderley* v. *Dixon*, 1 Sim. & Stu. 607.

[4] 1 Sim. & Stu. 607.

seeks not the uncertain dividends, but the certain sum to be paid for them. It has, however, been settled by repeated decisions that the remedy in equity must be mutual, and that where a bill will lie for the purchaser it will also lie for the vendor."[1]

Where a bill lies for purchaser it lies for vendor.

Courts of equity will compel the specific delivery "of articles of unusual beauty, rarity, and distinction, so that damages would not be an adequate compensation for non-performance."[2] In *Dowling* v. *Betjemann*,[3] it was decided that the court has jurisdiction to order the delivery up to an artist of a picture painted by himself, as having a special value, the legal remedy being inadequate. But where, by the terms of the agreement and the frame of the pleadings, the plaintiff, seeking restitution of a picture, had, in effect, put a fixed price upon it, it was held that damages would be an adequate remedy, and that there was no jurisdiction in a court of equity to interfere.

Contracts as to rare and beautiful articles of *virtu*, enforced.

Delivery up to artist of picture painted by himself enforced.

Unless he has fixed the price.

It has been repeatedly decided that it is within the jurisdiction of a court of equity to compel the specific delivery up of heirlooms or chattels of peculiar value to the owner, and on the same grounds as in cases of agreement, that the specific thing is the object, and damages will not afford an adequate compensation.[4] "Thus, the Pusey Horn, the patera of the Duke of Somerset, were things of such a character as a jury might estimate by their weight; and this would obviously be a very inadequate, and unsatisfactory, measure of damages. In all cases, therefore, where the object of the suit is not liable to a compensation by damages, it would be strange if the law of this country did not afford any remedy; and great would be the injustice if an individual cannot have his pro-

Delivery up of heirlooms and other chattels of peculiar value enforced.

The Pusey Horn.

Damages no compensation in such a case.

[1] *Wright* v. *Bell*, 5 Price, 325; *Kenney* v. *Wexham*, 6 Mad. 355; *Cogent* v. *Gibson*, 33 Beav. 557.

[2] *Falcke* v. *Gray*, 4 Drew. 658.

[3] 2 J. & H. 544.

[4] *Somerset* v. *Cookson*, 1 L. C. 736; *Pusey* v. *Pusey*, 1 Vern. 273.

perty without being liable to the estimate of people who cannot value it as he does." [1]

Specific performance where a fiduciary relation exists.

The cases which have been referred to are not the only class of cases in which this court will entertain a suit for delivery up of specific chattels. For, where a fiduciary relation subsists between the parties, whether it be that of an agent or a trustee or a broker, or whether the subject-matter be stock or cargoes, or chattels of whatever description, the court will interfere to prevent a sale, either by the party intrusted with the goods, or by a person claiming under him, through an alleged abuse of the power, and will compel a specific delivery up of the articles.[2]

Common law powers as to specific delivery. 17 & 18 Vict., c. 125.

The Courts of Common Law have now, under the Common Law Procedure Act of 1854,[3] after judgment in an action of detinue, the same jurisdiction to compel the return of a chattel as the Court of Chancery, but the latter court may enforce its decrees by attachment, whilst the courts of common law can only enforce restitution by distringas.[4]

II. Contracts respecting land.

II. Contracts respecting land.

Almost universally enforced.

It has been already suggested that courts of equity are in the habit of interposing to grant relief in cases of contracts respecting real property, to a far greater extent than in cases respecting personal property; not, indeed, upon the ground of any distinction founded upon the mere nature of the property, as real or as personal, but at the same time not wholly excluding the consideration of such a distinction. In regard to

[1] *Fells* v. *Read*, 3 Ves. 70; *Macclesfield* v. *Davis*, 2 V. & B. 16; *Reece* v. *Trye*, 1 De G. & Sm. 273; *Beresford* v. *Driver*, 14 Beav. 387; 16 Beav. 134.

[2] *Wood* v. *Rowcliffe*, 3 Hare, 304; 2 Ph. 383; *Pollard* v. *Clayton*, 1 K. & J. 462; *Edwards* v. *Clay*, 28 Beav. 145.

[3] 17 & 18 Vict., c. 125, s. 78.

[4] Day's Com. Law Proc. Acts, 249.

contracts respecting personal property, if the contract is not specifically performed, the purchaser may provide himself with other goods of a like description and quality, with the damages given him at law, and thus completely obtain his object. But in contracts respecting a specific messuage, or parcel of land, the same considerations do not ordinarily apply. The locality, character, vicinage, soil, easements, or accommodations of the land generally, may give it a peculiar and special value in the eyes of the purchaser, so that it cannot be replaced by other land of the same precise value, but not having the same precise local conveniencies or accommodations; and, therefore, a compensation in damages would not be adequate relief.[1] It would not attain the object desired, and it would generally frustrate the plans of the purchaser. And hence it is, that the jurisdiction of courts of equity to decree specific performance is, in cases of contracts respecting lands, universally maintained, whereas in cases respecting chattels it is limited to special circumstances.[2]

Damages at law no remedy.

The Statute of Frauds says that no action or suit shall be maintained on an agreement relating to lands which is not in writing, signed by the party to be charged with it; and yet the court is in the daily habit of relieving where the party seeking relief has been put into a situation which makes it against conscience in the other party to insist on the want of writing so signed as a bar to the relief.[3] It is now therefore proposed to inquire under what circumstances courts of equity hold that, notwithstanding the express language of the statute, a case may be taken out of its operation.

Statute of Frauds broken in upon, where it is unconscientious on a party to rely on it.

What will take a parol contract out of the operation of the statute.

In the first place, then, courts of equity will enforce

[1] *Adderley* v. *Dixon*, 1 Sim. & Stu. 607.
[2] St. 746.
[3] *Bond* v. *Hopkins*, 1 S. & L. 433.

Where the agreement is confessed by the defendant's answer.

a specific performance of a contract within the statute, not in writing, where it is fully set forth in the bill, and is confessed by the answer of the defendant.[1] The reason given for this decision is, that the statute is designed to guard against fraud and perjury; and in such a case there can be no danger of that sort. The case, then, is entirely taken out of the mischief intended to be guarded against by the statute. Perhaps another reason might fairly be added, and that is, that the agreement, although originally by parol, is now in part evidenced by writing under the signature of the party, which is a complete compliance with the terms of the statute. If such an agreement were originally by parol, but were afterwards reduced to writing by the parties, no one would doubt its obligatory force. Indeed, if the defendant does not insist on the defence, he may fairly be deemed to waive it; and the rule is, *Quisque renuntiare potest juri pro se introducto.*[2] It has been settled, however, that although the defendant by his answer confesses the parol agreement, but insists by way of defence upon the protection of the statute, the defence must prevail as a competent bar.[3]

Unless the defendant, notwithstanding, insists upon the defence.

Where the contract is partly performed by the party seeking aid.

Secondly, courts of equity will enforce a specific performance of a contract within the statute where the parol agreement has been partly carried into execution by the party praying relief.[4] The distinct ground upon which courts of equity interfere in cases of this sort is, that otherwise one party would be able to practise a fraud upon the other; and it could never be the intention of the statute to enable any party to commit a fraud with impunity. Indeed, fraud in all cases constitutes an answer to the most solemn acts

[1] *Att.-Gen.* v. *Sitwell*, 1 You. & Col. Exch. Ca. 559; *Gunter* v. *Halsey*, Amb. 586.

[2] St. 755; 1 Fonbl. Eq. B. 1. ch. 3, s. 8, note *d*.

[3] St. 757; *Cooth* v. *Jackson*, 6 Ves. 37; *Blagden* v. *Bradbear*, 12 Ves. 466, 471; *Skinner* v. *M'Douall*, 2 De G. & Sm. 265.

[4] *Caton* v. *Caton*, L. R. 1 Ch. 137.

and conveyances, and the objects of the statute are promoted instead of being obstructed by a jurisdiction for discovery and relief. And where one party has executed his part of the agreement in the confidence that the other party would do the same, it is obvious that if the latter should refuse, it would be a fraud upon the former to suffer this refusal to work to his prejudice.[1]

Else a fraud would be committed on the plaintiff.

In order thus to withdraw a contract from the operation of the statute several circumstances must concur.

(1.) The acts of part performance must be such as are not only referable to an agreement such as that alleged, but such as are referable to no other title. For if they are acts which might have been done with other views, they will not take the case out of the statute, since they cannot properly be said to be done by way of part performance of the agreement.[2] On this account, acts merely introductory or ancillary to an agreement are not considered as part performance thereof, although they should be attended with expense. Therefore, delivering an abstract of title, giving directions for conveyances, going to view the estate, fixing upon an appraiser to value stock, making valuations, admeasuring the lands, registering conveyances, and acts of the like nature, are not sufficient to take a case out of the statute.[3] They are all preliminary proceedings, and are, besides, of an equivocal character, and capable of a double interpretation; whereas acts to be deemed a part performance should be so clear, certain, and definite in their object and design, as to refer exclusively to a complete and perfect agreement, of which they are a part execution.[4]

(1.) Acts of part performance must be referable alone to the agreement alleged.

Introductory or ancillary acts not acts of part performance.

[1] *Nichol* v. *Tackaberry*, 10 Gr. 109; St. 759.
[2] *Gunter* v. *Halsey*, Amb. 586; *Lacon* v. *Mertins*, 3 Atk. 4.
[3] *Hawkins* v. *Holmes*, 1 P. Wms. 770; *Pembroke* v. *Thorpe*, 3 Swanst. 437; *Whitchurch* v. *Bevis*, 2 Bro. C. C. 559, 566.
[4] St. 762.

Mere possession of the land not an act of part performance, if held under a previous tenancy.

In like manner the mere possession of the land contracted for will not be deemed a part performance if it be wholly independent of the contract; therefore, where a tenant in possession sued for the specific performance of an alleged agreement for a lease, and set up his possession as an act of part performance of the agreement, it was held not to be such, because it was referable to his character as tenant.[1] So again where a tenant from year to year continues in possession, and lays out such moneys on the farm as are usual in the ordinary course of husbandry, this is no part performance of an agreement for a lease.[2] But if the possession be delivered, and delivered and obtained solely under the contract; or if, in case of tenancy, the nature of the holding be different from the original tenancy, as by the payment of a higher rent, or by other unequivocal circumstances, referable solely and exclusively to the contract, there the possession may take the case out of the statute. Especially will it be held to do so where the party let into possession has expended money in building and repairs or other improvements; for under such circumstances, if the parol contract were to be deemed a nullity, the expenditure would not only operate to his prejudice, but be the direct result of a fraud practised upon him; and besides, he would be liable to be treated as a trespasser.[3]

But if possession is referable to the contract alone, it is an act of part performance.

Especially where tenant has expended money in improvements.

The tenant would else be liable as a trespasser.

(2.) The agreement must originally have been cognizable in a court of equity, independently of the acts of part performance.

(2.) The agreement which the acts of part performance allow to be set up by parol evidence must be of such a nature that the court would have had jurisdiction in respect of it, in case it had been in writing. Where the court has jurisdiction in the original subject-matter, viz., the contract, the want of writing will not deprive the court of it where there is part perform-

[1] *Wills* v. *Stradling*, 3 Ves. 378; *Morphett* v. *Jones*, 1 Swanst. 181.
[2] *Brennan* v. *Bolton*, 2 Dr. & War. 349.
[3] *Lester* v. *Foxcroft*, 1 L. C. 693; *Aylesford's Case*, 2 Str. 783; *Mundy* v. *Jolliffe*, 5 My. & Cr. 167; *Gregory* v. *Mighell*, 18 Ves. 328; *Pain* v. *Coombs*, 1 De G. & Jo. 34, 46.

ance. But the want of writing cannot itself be made the ground of jurisdiction; for then all parol contracts which the Statute of Frauds requires to be in writing might be enforced in equity when there was a part performance.[1] And where the possession taken is not under a contract, but adverse, the circumstance that there is no legal remedy does not suffice to give the court jurisdiction.[2]

Payment of a part or the whole of the purchase-money is not an act of part performance so as to take a contract out of the Statute of Frauds;[3] "for it may be repaid, and then the parties will be just as they were before, especially if repaid with interest. It does not put a man who has parted with his money into the situation of a man against whom an action may be brought; for in the case of *Foxcroft* v. *Lester*, which first led the way, if the party could not have produced in evidence the parol agreement, he might have been liable in damages to an immense extent." Another reason alleged for the rule that "part payment does not take the case out of the statute is, that the statute has said,[4] that in another case, viz., with respect to goods, it shall operate as a part performance. And the courts have therefore considered this as excluding agreements for lands, because it is to be inferred that when the legislature said it should bind in the case of goods, and were silent as to the case of lands, they meant that it should not bind in the case of lands."[5]

Payment of part or whole of purchase-money is not an act of part performance. Repayment will put the parties into the same position as before.

29 Car. 2. c. 3. sec. 17 provides for part payment as to goods.

Expressio unius, exclusio alterius.

[1] Fry on Spec. Performance, 179; *Kirk* v. *Bromley Union*, 2 Phil. 640.

[2] *East India Co.* v. *Veerasawmy Moodely*, 7 Moo. P. C. C. 482.

[3] *Hughes* v. *Morris*, 2 De G. M. & G. 349.

[4] Sec. 17.

[5] *Clinan* v. *Cooke*, 1 S. & L. 41; *Seagood* v. *Meale*, Prec. in Ch. 560. But see *Watt* v. *Evans*, 4 You. & Coll. Exch. Ca. 580, where Lord Lyndhurst said:—"To this argument it had been replied that it had proved too much, for *delivery* or *part delivery* of goods is expressly allowed by the statute to take a contract out of it, and yet it is not considered to negative the position that delivery of possession of real estate shall have the same effect. But to this it is answered, that were not the delivery of possession of lands to take the case out of the statute, the purchaser would be led into difficulties, and would be a trespasser."

Marriage is not part performance.

Marriage is not alone a part performance of a parol agreement in relation to it; for to hold this would be to overrule the Statute of Frauds, which enacts that every agreement in consideration of marriage to be binding must be in writing.[1] But a parol contract may be taken out of the statute by acts of part performance independently of the marriage. Thus, in *Surcombe* v. *Pinniger*,[2] a father, previous to the marriage of his daughter, told her intended husband that he meant to give certain leasehold property to them on their marriage. After the marriage he gave up possession of the property to the husband, to whom he directed the tenants to pay the rents, and handed to the husband the title-deeds. The husband also expended money upon the property. It was held that there had been sufficient part performance of the parol contract to take the case out of the Statute of Frauds. "In this case," said Turner, L. J., "there is a part performance by the delivering up of possession to the husband,—a fact which has always been held to change the situations and rights of the parties,—and there has been considerable expenditure by him on the property. There is, therefore, here what was wanting in *Lassence* v. *Tierney*[3]—acts of part performance besides the marriage."[4]

Acts of part performance independently of marriage take the case out of the statute.

A post-nuptial written agreement in pursuance of an ante-nuptial parol agreement enforced —semble.

It would seem, also, that if there be "a written agreement after marriage in pursuance of a parol agreement before marriage, this takes the case out of the statute."[5]

[1] *Warden* v. *Jones*, 2 De G. & Jo. 76; *Caton* v. *Caton*, 1 L. R. Ch. 137; L. R., 2 Ho. of Lds. 127.

[2] 3 De G. M. & G. 571.

[3] 1 Mac. & G. 551.

[4] *Warden* v. *Jones*, 2 De G. & Jo. 84.

[5] Turner, L. J., in *Surcombe* v. *Pinniger*, 3 De G. M. & G. 571; *Dundas* v. *Dutens*, 1 Ves. 196; *Barkworth* v. *Young*, 26 L. J. Ch. 157; Peach. on Marr. Sett. 81; but see Lord Cranworth's remarks in *Warden* v. *Jones*, 2 De G. & Jo. 85. The object of the 4th sec. of the Statute of Frauds was not to alter principles of law, but modes of evidence. Its object was to prevent the mischief arising from resorting to oral evidence to prove the existence of the terms

A representation for the purpose of influencing another, which has that effect, will be enforced. Where on marriage a third party makes a representation, on the faith of which marriage takes place, he is bound to make it good.

It is a very old head of equity that "a representation made by one party for the purpose of influencing the conduct of the other party, and acted on by him, will be sufficient to entitle him to the assistance of this court, for the purpose of realising such representation;"[1] and it is a leading principle, repeatedly adopted in equity, that where, upon the marriage of two persons, a third party makes a representation upon the faith of which marriage takes place, he shall be bound to make his representation good.[2] It was upon this principle that an injunction was granted to restrain the enforcement of a demand, the party seeking to enforce it having, while a marriage treaty was pending, falsely represented to the father of the lady that there was no such demand existing. "If," said Lord Thurlow, "any man, upon a treaty for any contract, will make a false representation, by means of which he puts the person bargaining under a mistake upon the terms of the bargain, it is a fraud—it misleads the parties contracting on the subject of the contract. . . . The principle upon which all the cases upon this subject have been decided is, that faith in such contracts is so essential to the happiness both of the parents and children, that whoever treats them fraudulently on such an occasion, shall not only not gain, but even lose by it."[3]

But where the representation is not of an existing

of an alleged verbal agreement in certain specified cases, and, amongst the rest, an agreement made in consideration of marriage. It is obvious that there can be no ground to apprehend any such mischief where you have a writing signed after marriage by the party to be charged, and referring clearly to the terms of an ante-nuptial agreement. It would seem to be sufficient if there be a memorandum clearly containing the terms of the agreement before the action or suit arises. *Barkworth* v. *Young*, 26 L. J. Ch. 157; *Bailey* v. *Sweeting*, 30 L. J. C. P. 150; *Smith* v. *Hudson*, 6 N. R. 106.

[1] *Hammersley* v. *De Biel*, 12 Cl. & Fin. 62, 78.

[2] *Bold* v. *Hutchinson*, 20 Beav. 256; 5 De G. M. & G. 558; *Walford* v. *Gray*, 13 W. R. 335; Affd. Ib. 761; *Goldicutt* v. *Townsend*, 28 Beav. 445; *Prole* v. *Soady*, 2 Giff. 1.

[3] *Neville* v. *Wilkinson*, 1 Bro. C. C. 543; *Montefiori* v. *Montefiori*, 1 Wm. Bl. 363.

Representation of a mere intention, or a promise upon honour, not enforced.

fact, but of a mere intention, or where a promisor will not bind himself by a contract, but gives the other party to understand that he must rely upon his honour for the fulfilment of his promise, it seems the court will not enforce the performance of the representation or promise.[1]

Thus, in *Caton* v. *Caton*,[2] previously to marriage, the intended husband and wife agreed in writing that the husband should have the wife's property for his life, paying her £80 a year pin-money, and that she should have it after his death; and they gave instructions for a settlement upon that footing. The settlement was accordingly prepared, when they agreed that they would have no settlement, the husband promising, as the wife alleged, that he would make a will giving her all his property. The husband had previously to the marriage prepared a will, and immediately after the marriage the husband and wife went into the vestry, and he there executed the will. After his death, a subsequent and different will was found. It was held by the Lord Chancellor and the House of Lords (reversing the decision of Stuart, V.C.) that the wife was not entitled to specific performance of the agreement by the husband to leave her his property by will.

Promise by husband to leave property by will not enforced.

Where agreement concerning land is not put into writing by fraud of one of the parties.

And the case will be taken out of the operation of the statute, where the agreement is intended to be put into writing according to the statute, but it is prevented from being done by the fraud of one of the parties. In such a case courts of equity have said that the agreement shall be specifically executed, for otherwise the statute, designed to suppress fraud, would be the greatest protection to it. Thus, if an

[1] *Maunsell* v. *White*, 1 Jo. & L. 539; 4 H. L. Cas. 1039; *Jorden* v. *Money*, 15 Beav. 372; 2 De G. M. & G. 318; 5 Ho. of Lds. Cas. 185.

[2] L. R. 1 Ch. 137; L. R., 2 Ho. of Lds. 127.

agreement in writing should be proposed and drawn, and another should be fraudulently and secretly brought in, and executed in lieu of the former, in this and the like cases equity will relieve. So if a man should treat for a loan of money on mortgage, and the conveyance is to be by an absolute deed of the mortgagor and a defeasance by the mortgagee, and, after the absolute deed is executed, the mortgagee fraudulently refuses to execute the defeasance, equity will decree a specific performance.[1]

Grounds of defence to a suit for specific performance.

It is now proposed to consider the principal defences that may be set up to a suit for specific performance, independently of the Statute of Frauds.

Misrepresentation by plaintiff having reference to the contract.

A misrepresentation, having relation to the contract, made by one of the parties to the other, is a ground for refusing the interference of the court at the instance of the party who has made the misrepresentation, and may, in certain cases, be a ground for its active interference in setting aside the contract, at the instance of the party deceived.[2]

To entitle a plaintiff to more than legal relief, he must have a conscientious title.

Mistake is also a ground of defence. The principle upon which courts of equity proceed in those cases where mistake is the ground of defence is this—that there must be an agreement binding at law; but that is not enough to entitle the plaintiff to more than his legal remedy, the contract must be more than merely legal. It must not be hard or unconscionable; it must be free from fraud, from surprise, and from mistake; for where there is a mistake, there is not that consent which is essential to a contract in equity: *non videntur qui errant consentire.*[3]

[1] St. 768; *Maxwell* v. *Montacute*, Prec. Ch. 526; *Joynes* v. *Statham*, 3 Atk. 389; *Lincoln* v. *Wright*, 4 De G. & Jo. 16.

[2] *Edwards* v. *M'Leay*, Coop. 308; *Baskcomb* v. *Beckwith*, L. R. 8 Eq. 100; *Talbot* v. *Hamilton*, 4 Gr. 200; Fry on Spec. Perf. 191.

[3] Fry on Spec. Perf. 212.

Parol evidence of mistake is admitted notwithstanding the statute.

It has been said that to admit parol evidence of a mistake, is to overrule the Statute of Frauds. However that may be, the settled rule of the court is to admit such evidence, not merely for the purpose of defence to a specific performance, but for the purpose of correcting the mistake. It should be remembered that the statute says, "No person shall be charged with the execution of an agreement who has not, either by himself or his agent, signed a written agreement;" but the statute does not say that if a written agreement is signed, the same exception shall not hold to it that did before the statute. Now, before the statute, if a bill had been brought for specific performance, and it had appeared that the agreement had been prepared contrary to the intent of the defendant, he might have said, 'That is not the agreement meant to have been signed.' Such a case is left as it was before the statute: it does not say that a written agreement shall bind, but that an unwritten agreement shall not bind."[1]

The statute does not say a written agreement shall bind, but an unwritten agreement shall not bind.

Contract not enforced where defendant has been led into an error even through carelessness.

It follows from what has been stated that, where the defendant has been led into any error or mistake, the plaintiff cannot enforce the contract. Thus, in one case,[2] a professional man was relieved at his own suit from an error in a deed of his own drawing. On the same principle, in *Malins* v. *Freemen*,[3] where an estate was purchased at an auction, under a mistake as to the lot put up for sale, and the mistake arose wholly through the carelessness of the defendant, it was held that specific performance would not be enforced. The Master of the Rolls said:—"The defendant submits that he entered into it by error and in mistake, and that he ought not to be compelled specifically to perform it. Certainly, if the defendant did fall into any mistake, it cannot be ascribed to the

[1] *Clinnan* v. *Cooke*, 1 Sch. & Lef. 39.

[2] *Ball* v. *Storie*, 1 S. & S. 210.

[3] 2 Keen, 25, 34.

conduct of the plaintiff. The plaintiff and his agents in no respect contributed to it, and if the defendant, by his carelessness, has caused any injury or loss to the plaintiff, he is accountable for it.

"But the defendant may be answerable for damages at law, without being liable to a specific performance in this court. In cases of specific performance, the court exercises a discretion, and knowing that a party may have such compensation as a jury will award him in the shape of damages for the breach of contract, will not, in all cases, decree a specific performance; as in cases of intoxication, although the party may not have been drawn in to drink by the plaintiff, yet, if the agreement was made in a state of intoxication, the court will not decree a specific performance. And the question here is not, as it has been put, whether the alleged mistake, if true, is one in respect of which the court will relieve, for the court is not here called upon to relieve the defendant from his legal liability, but whether, if the mistake be proved, the court will enforce a specific performance, leaving the defendant to his legal liability. And I think that if such a mistake, as is here alleged to have happened, be made out, a specific performance ought not to be decreed. . . . I am of opinion that the defendant never did intend to bid for this estate. He was hurried and inconsiderate, and when his error was pointed out to him, he was not so prompt as he ought to have been in declaring it. It is probable that, by his conduct, he occasioned some loss to the plaintiff; for that he is answerable, if the contract was valid, and will be left so, notwithstanding the decision to be now made. But I think that he never meant to enter into this contract, and that it would not be equitable to compel him to perform it, whatever may be the responsibility to which he is left liable at law."[1]

But he is liable for damages at law.

Contract not enforced where defendant did not intend to purchase.

[1] *Manser* v. *Back*, 6 Hare, 443; *Alvanley* v. *Kinnaird*, 2 Mac. & G. 7; *Baxendale* v. *Seale*, 19 Beav. 601; *Wood* v. *Scarth*, 2 K. & J. 33.

Effect of a mistake, a parol variation set up as a defence.

We may now proceed to consider the effect of a mistake, or parol variation, set up by the defendant as a ground for refusing the specific performance of a written agreement alleged by the plaintiff.[1]

Where the error arose not in the original agreement, but in the reduction of it into writing, specific performance decreed with parol variation set up by the defendant.

1. Where the parol variation set up by the defendant shows that, after the parties to the contract had mutually agreed with each other, an error occurred in the reduction of the agreement into writing, and it appears that the written agreement, varied according to the defendant's contention, represents the true contract between the parties, the court will, it seems, where there has been no fraud, enforce specific performance of the contract so varied. Thus, where a bill was brought for the specific performance of an agreement to grant a lease at a rent of £9 per annum, and the defendant insisted that it ought to have been a term of the agreement that the plaintiff should pay all taxes, Lord Hardwicke granted specific performance, and directed that the terms of the verbal agreement should be carried out by the covenants to be inserted in the lease.[2]

Secus—where a misunderstanding as to terms of agreement.

But where the mistake or parol variation set up by the defendant does not show a mere mistake in the reduction of the contract into writing, but that one party understood one thing, and the other another, there is no such contract as the court will enforce, and the plaintiff's bill is consequently dismissed.[3]

Plaintiff cannot obtain specific performance with parol variation of written agreement.

And the distinction is now apparently well established between the case of a plaintiff seeking, and a defendant resisting specific performance. The rule is, that though a defendant, resisting specific performance, may go into parol evidence to show that,

[1] See generally Fry on Spec. Perf. 216–236.

[2] *Joynes* v. *Statham*, 3 Atk. 388.

[3] *Legal* v. *Miller*, 2 Ves. Sr. 299.

by fraud, accident, or mistake, the written agreement does not express the real terms, a plaintiff, with the exception hereafter noted, cannot do so for the purpose of obtaining specific performance with a variance.

Exception—unless the parol variation be in favour of the defendant.

Where, however, a plaintiff alleges a parol variation *in favour of the defendant*, and offers to perform the agreement with the variation, the court will enforce specific performance, though the defendant plead the statute. Thus where the defendant agreed in writing to grant the plaintiff a lease at a specified rent, and for a specified term, and the plaintiff filed a bill for specific performance, stating the above agreement, and that it was further agreed that he, the plaintiff, should pay a premium of £200, which, by his claim, he offered to do; the defendant, acknowledging that the terms were such as the plaintiff represented them, insisted that, as the written agreement did not provide for those terms, the statute was a good defence. It was held, however, that this additional term did not render the statute a good defence, and Knight Bruce, L.J., said—"Our opinion is, that when persons sign a written agreement upon a subject obnoxious, or not obnoxious, to the statute that has been so particularly referred to,[1] and there has been no circumvention, no fraud, nor (in the sense in which the term 'mistake' must be considered as used for the purpose) mistake, the written agreement binds at law and in equity, according to its terms, although verbally a provision was agreed to, which has not been inserted in the document; subject to this, that either of the parties, sued in equity upon it, may, perhaps, be entitled, in general, to ask the court to be neutral, unless the plaintiff will consent to the performance of the omitted term."[2] In such cases as these, the court interferes for the purpose of reforming the contract, and not

The defendant may ask the court to be neutral, unless the plaintiff will perform the omitted term.

[1] 29 Car. II. c. 3.

[2] *Martin* v. *Pycroft*, 2 De G. M. & G. 785; *Parker* v. *Taswell*, 2 De G. & Jo. 559.

rescinding it. "No doubt," says Lord Hardwicke,[1] "but this court has jurisdiction to relieve in respect of a plain mistake in contracts in writing, as well as against frauds in contracts; so that, if reduced into writing contrary to intent of the parties, on proper proof, that would be rectified."

Townshend v. *Stangroom.*

The case of *Townshend* v. *Stangroom*,[2] affords a strong illustration of the above-mentioned distinction between the rights of a plaintiff and of a defendant setting up a parol variation to a written contract. There a lessor filed a bill for the specific performance of a written agreement for a lease, with a variation as to the quantity of land to be included in the lease, supported by parol evidence. The lessee filed a cross-bill for specific performance of the written agreement simply. Lord Eldon dismissed both bills; the first, because the parol evidence was not admissible on behalf of the lessor seeking specific performance; the second, because it was admissible when adduced by such lessor, as *defendant*, for the purpose of showing that, by mistake or surprise, the written agreement did not contain the terms intended to be introduced into it.[3]

Subsequent parol variation.

Where the parol variation, which the plaintiff or defendant seeks to set up, is a subsequent agreement in parol between the parties to a written agreement, the case in nowise comes within the doctrine of mistake, and the parol variation is inadmissible under the Statute of Frauds, except in cases, where the refusal to perform it might amount to fraud;[4] or unless there have been such acts of part performance

[1] *Henkle* v. *Roy. Ex. Assoc. Co.*, 1 Ves. Sr. 317.
[2] 6 Ves. 328.
[3] *Woollam* v. *Hearn*, 2 L. C. 440, 454.
[4] See observations of Sir W. Grant in *Price* v. *Dyer*, 17 Ves. 364.

as would justify a decree in the case of an original substantive agreement.[1]

Misdescription a ground of defence.

One not uncommon ground of defence is, that, by a misdescription of the property, the defendant has purchased what he never intended to purchase. Under this defence, two classes of cases arise—

1. Cases where the misdescription is of a substantial character, and will not, in justice, admit of compensation.

2. Cases where the misdescription is of such a character as fairly to admit of compensation.

Where the misdescription is of a substantial character it is a good defence.

In cases of substantial misdescription. The principle governing this class of cases is thus summed up by Lord Eldon:[2]—"The court is, from time to time, approaching nearer to the doctrine that a purchaser shall have that which he contracted for, or not be compelled to take that which he did not mean to have."

Whether misdescription is substantial is a matter of evidence.

As to the question whether a misdescription is a substantial one or not, is a question concerning which no general rule can be laid down. Each case will be decided on its own particular facts.

1. Purchaser not compelled to take freehold instead of copyhold.

1. Cases where vendor seeks specific performance. Where property sold as copyhold turned out to be partly freehold, it was held that the vendor could not compel specific performance, notwithstanding a special condition providing that errors in the description should not invalidate the sale. It was insisted for the vendor that freehold was better than copyhold, but the Master of the Rolls said:—"It is impossible

[1] *Legal* v. *Miller*, 2 Ves. Sr. 299; *Van* v. *Corpe*, 3 My. & K. 269, 277.

[2] *Knatchbull* v. *Grueber*, 3 Mer. 146.

to enter into a consideration of the different motives which may induce a person to prefer property of one tenure to another. The motives and fancies of mankind are infinite, and it is unnecessary for a man who has contracted to purchase one thing to explain why he refuses to accept another."[1]

Under-lease for an original lease.

So, a purchaser is not compelled to take an under lease instead of an original lease.[2] So again, where a wharf and jetty were contracted to be sold, and it turned out that the jetty was liable to be removed by the Corporation of London, specific performance was refused.[3] In the case of the sale of a residence and four acres of land, it turned out that there was no title to a slip of ground of about a quarter of an acre between the house and the high road, the Master of the Rolls said:—"Under ordinary circumstances, this would be a case for compensation; but here is a house, with a long strip of land between it and the road, to which there is no title, so that the people in passing can look in at the window. This is not a case for compensation."[4]

Where the difference is slight, and a proper subject for compensation, it will be enforced with compensation; as where acreage is deficient.

Where, however, although a purchaser gets a different thing from that which he intended to purchase, if in the eye of the court the difference is not material, and is such that it is a proper subject for compensation, the court will enforce the contract, at the suit of the vendor, compelling him to make compensation to the purchaser. There, where there was an objection to the title of six acres out of a large estate, and these did not appear material to the enjoyment of the rest,[5] specific performance was never-

[1] *Ayles* v. *Cox*, 16 Beav. 23; *Drewe* v. *Corp*, 9 Ves. 368; *Wright* v. *Howard*, 1 S. & S. 190.

[2] *Madeley* v. *Booth*, 2 De G. & Sm. 718.

[3] *Peers* v. *Lambert*, 7 Beav. 546.

[4] *Perkins* v. *Ede*, 16 Beav. 193; *Knatchbull v. Grueber*, 3 Mer. 124.

[5] *M'Queen* v. *Farquhar*, 11 Ves. 467; *Shackleton* v. *Sutcliffe*, 1 De G. & Sm. 609.

theless decreed. So again, where fourteen acres were sold as water-meadow, and twelve only answered that description, it was held a fit subject for compensation.[1]

The principle of granting compensation in lieu of rescinding the contract, in case of any error or misstatement, will never be applied where there has been fraud or misrepresentation.[2] It is also a necessary principle that, where there are no data from which the amount of compensation can be ascertained, the court cannot enforce the contract with compensation. But this objection is one which the courts are unwilling to entertain.[3]

No compensation where there has been fraud.

Nor where the compensation cannot be estimated.

2. Where purchaser seeks specific performance.

Purchaser can compel specific performance with an abatement.

The law is thus laid down by Sir William Grant in *Hill* v. *Buckley*,[4] "Where a misrepresentation is made as to the quantity, though innocently, I apprehend the right of the purchaser to be, to have what the vendor can give, with an abatement out of the purchase-money for so much as the quantity falls short of the representation." "If," observes Lord Eldon, "a man, having partial interests in an estate, chooses to enter into a contract representing it, and agreeing to sell it, as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety, and therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under these circumstances is bound by the assertion in his contract, and if the vendee chooses to take as much as he can have, he has a right to that, and to an abatement, and the court will not hear the

Vendor must sell what interest he has if purchaser elect.

[1] *Scott* v. *Hanson*, 1 R. & My. 128.

[2] *Clermont* v. *Tasburgh*, 1 J. & W. 120; *Price* v. *Macaulay* 2 De G. M. & G. 339, 344.

[3] *Ramsden* v. *Hirst*, 4 Jur. N. S. 200; *Brooke* v. *Rounthwaite*, 5 Hare, 298.

[4] 17 Ves. 401; but see *Durham* v. *Legard*, 34 L. J. Ch. N. S. 589.

objection by the vendor, that the purchaser cannot have the whole."[1]

Partial performance not compelled where unreasonable or prejudicial to third parties.

Courts of equity will not, at the suit of a purchaser, compel a partial performance of a contract which is unreasonable or prejudicial to third parties interested in the property,[2] nor where the deficiency as to the extent or duration of an interest contracted to be sold does not admit of compensation.[3]

Lapse of time.

At law, time always of the essence of the contract.

The objection that a plaintiff has not performed his part of the contract at the time specified, may furnish grounds of defence to suits for specific performance. At law, the plaintiff must show that all those things which are on his part to be performed, have been performed within a reasonable time, or where time is specified by the contract, within the time so specified. At law, time is always of the essence of the contract.[4]

Equity is guided by the nature of the case as to time.

But in equity, the question of time is differently regarded; for a court of equity discriminates between those terms of a contract which are formal, and a breach of which it would be inequitable in either party to insist on as a bar to the other's rights, and those which are of the substance and essence of the agreement;[5] and applying to contracts those principles which have governed its interference in relation to mortgages,[6] it has held time to be *primâ facie* non-essential, and has accordingly granted specific performance of agreements after the time for their performance has been suffered to pass, by the party

[1] *Mortlock* v. *Buller*, 10 Ves. 315; *Wilson* v. *Williams*, 3 Jur. N. S. 810; *Seaman* v. *Vawdrey*, 16 Ves. 390; *Painter* v. *Newby*, 11 Hare, 26.

[2] *Thomas* v. *Denny*, 1 Keen, 729; *Beeston* v. *Stutely*, 6 W. R. 206.

[3] *Balmanno* v. *Lumley*, 1 V. & B. 225; *Ridgway* v. *Gray*, 1 Mac. & G. 109.

[4] *Stowell* v. *Robinson*, 3 Bing. N. C. 928.

[5] *Parkin* v. *Thorold*, 16 Beav. 59.

[6] Per Lord Eldon in *Seton* v. *Slade*, 7 Ves. 273.

asking for the intervention of the court, if the other party has not shown a determination to proceed. There are, however, certain cases where lapse of time is a bar to relief in equity.

When lapse of time is a bar in equity.

1. Those cases where time was originally of the essence of the contract; and this whether made so by the express agreement of the parties,"[1] or from the nature of the subject-matter with which the parties are dealing, as in the case of reversionary interests.[2]

1. Where time was originally of the essence of the contract.

2. Those cases where, though time was not of the essence of the contract, it was engrafted upon it by subsequent notice.[3]

2. Where time is made of the essence of the contract by subsequent notice.

3. Cases where the delay has been so great as to constitute laches, disentitling the party to the aid of the court, and evidencing an abandonment of the contract irrespectively of any peculiar stipulations as to time.[4]

3. Where lapse of time is evidence of laches or abandonment.

It has already been pointed out that courts of equity will never countenance fraud, and that where there is reason to believe that a contract is tainted with fraud, the court will refuse relief unless the party seeking its aid comes with clean hands, and has a conscientious title to relief.[5] If, therefore, there has been actual misrepresentation,[6] or fraudulent suppression of the

Equity will refuse aid unless a party comes with clean hands.

[1] *Hudson* v. *Bartram*, 3 Mad. 440; *Honeyman* v. *Marryat*, 21 Beav. 14, 24.

[2] *Hipwell* v. *Knight*, 1 Y. & C. Exch. Ca. 416; *Withy* v. *Cottle*, T. & R. 78; *Walker* v. *Jeffreys*, 1 Hare, 341.

[3] *Taylor* v. *Brown*, 2 Beav. 180; *Benson* v. *Lamb*, 9 Beav. 502; *Macbryde* v. *Weekes*, 22 Beav. 533.

[4] *Moore* v. *Blake*, 1 Ball, & B. 62; *Milward* v. *Thanet*, 5 Ves. 720 *n.*; *Eads* v. *Williams*, 4 De G. M. & G. 691.

[5] *Harnett* v. *Yeilding*, 2 S. & L. 554; *Reynell* v. *Sprye*, 1 De G. M. & G. 660.

[6] *Brooke* v. *Rounthwaite*, 5 Hare, 298; *Higgins* v. *Samels*, 2 J. & H. 460; *Farebrother* v. *Gibson*, 1 De G. & Jo. 602.

truth,[1] equity will refuse to enforce specific performance.

Equity will refuse specific performance where there is great hardship in the contract.

Although, as a general rule of equity, inadequacy of consideration, except in cases of sales of reversionary interests,[2] and except where fraud or imposition is presumed, is not a ground for refusing specific performance;[3] still, as the aid by equity in such cases is discretionary, a contract which would work a great hardship will not be enforced, but the plaintiff will be left to his remedy at law.[4]

Or where it involves the doing of an unlawful act, or breach of trust.

So again, as we have already seen, specific performance of an agreement to perform an unlawful act,[5] or which would involve a breach of trust; will not be enforced.[6]

[1] *Drysdale* v. *Mace*, 5 De G. M. & G. 103; *Shirley* v. *Stratton*, 1 Bro. C. C. 440.

[2] *Playford* v. *Playford*, 4 Hare, 546; and see supra, p. 395.

[3] *Sullivan* v. *Jacob*, 1 Moll. 477.

[4] *Wedgwood* v. *Adams*, 6 Beav. 600, 8 Beav. 103; *Watson* v. *Marston*, 4 De G. M. & G. 230, 239; *Tildesley* v. *Clarkson*, 30 Beav. 419; *Peacock* v. *Penson*, 11 Beav. 355.

[5] *Howe* v. *Hunt*, 31 Beav. 420; *Harnett* v. *Yeilding*, 1 S. & L. 554.

[6] *Mortlock* v. *Buller*, 10 Ves. 292; *Rede* v. *Oakes*, 13 W. R. 303; *Sneesby* v. *Thorne*, 7 De G. M. & G. 399.

CHAPTER X.

INJUNCTION.

Definition.

An injunction is a writ remedial, issuing by order of a court of equity, and now in some cases by a court of law, acting as a court of equity, in those cases where the plaintiff is entitled to equitable relief, by restraining the commission or continuance of some act of the defendant.[1]

Its object is preventive rather than restorative.

The object of this process is generally preventive and protective rather than restorative, although it is by no means confined to the former. It seeks to prevent a meditated wrong more often than to redress an injury already done. It is not confined to cases falling within the exercise of the concurrent jurisdiction of the court; but it equally applies to cases belonging to its exclusive and to its auxiliary jurisdiction. It is treated of, however, in this place principally because it forms a broad foundation for the exercise of concurrent jurisdiction in equity.[2]

Jurisdiction of equity arose from want of adequate remedy at law.

The writ of injunction is peculiarly an instrument of the Court of Chancery, though there are some cases where courts of law, before the Common Law Procedure Act 1854, were accustomed to exercise analogous powers, as by the writ of prohibition and estrepment in cases of waste.[3] The cases, however, to which these legal processes are applicable are so few and so utterly inadequate for the purposes of justice, that the processes themselves have fallen into

[1] Joyce on Injunctions, 1.
[2] St. 862.
[3] *Jefferson* v. *Bishop of Durham*, 1 Bos. & P. 105, 120–132.

disuse, and almost all the remedial justice of this sort is now administered through the instrumentality of courts of equity. The jurisdiction in these courts, then, has its true origin in the fact that there is either no remedy at all at law, or the remedy is imperfect and inadequate.

The cases in which courts of equity interfere by way of injunction may be classed under two heads—

Two classes of injunctions.

I. Injunctions to prevent the institution or continuance of judicial proceedings in some other court.

II. Injunctions to restrain wrongful acts of a special nature.

I. To stay proceedings at law.

I. Injunctions to stay proceedings at law in other courts.

At first sight it may seem that a court of equity in granting an injunction against proceeding in a court of common law, detracts from the dignity of that court and interferes with its process; and until the reign of James I., the common law judges as strenuously resisted this exercise of equitable jurisdiction as the chancellors asserted it.[1] But there does not seem any just foundation for the opposition of the courts of common law to this jurisdiction. A writ of injunction is in no real sense a prohibition to those courts in the exercise of their jurisdiction. It is not addressed to those courts. It does not even affect to interfere with them. The process, when its object is to restrain proceedings at law, is directed only to the parties. It neither assumes any superiority over the court in which those proceedings are had, nor denies its jurisdiction. It is granted on the sole ground, that from certain equitable circumstances, of

This power does not interfere with the jurisdiction of the common law courts.

[1] Hallam's Const. Hist., vol. i. p. 472.

which the court of equity granting the process has cognisance, it is against conscience that the party inhibited should proceed in the cause. Equity, in short, acts *in personam*. In all cases, therefore, where by accident, mistake, or fraud, or otherwise, a party has an unfair advantage in proceedings in a court of law, which must necessarily make that court an instrument of injustice, and it is therefore against conscience that he should use that advantage, a court of equity will restrain him from using that advantage which he has thus improperly gained.[1]

Equity acts *in personam* on the conscience of the person enjoined. Courts of law must not be made a means of committing fraud.

Upon the same principle, although the courts of one country have no authority to stay proceedings in the courts of another, they have an undoubted authority to control all persons and things within their own territorial limits. Where, therefore, both parties to a suit in a foreign country are resident within the jurisdiction of the court of equity, it will restrain either party from proceeding in a suit out of its jurisdiction. They do not pretend to direct or control the foreign court, but, without regard to the situation of the subject-matter of the dispute, they consider the equities between the parties, and decree *in personam* according to those equities, and enforce obedience to their decrees by process *in personam*.[2]

Courts of equity may restrain proceedings in a foreign court, if the parties are within their jurisdiction.

It would be difficult to enumerate all the cases where courts of equity would grant an injunction, whether generally or to stay proceedings at law. They will afford this relief not only where the defendant would have a complete remedy at law if he were in possession of the appropriate proofs, but also where the rights of the parties are wholly equitable in their nature, or incapable, under the circumstances, of being

Equity grants relief where the remedy at law would be complete if proofs could be had. And also in cases of purely equitable rights.

[1] St. 875, 885.

[2] *Portarlington* v. *Soulby*, 3 My. & K. 106; *Hope* v. *Carnegie*, L. R. 1 Ch. 320; *Carron Iron Co.* v. *Maclaren*, 5 H. L. Cas. 416-437.

asserted in a court of law. A brief enumeration of some of the chief cases in which a court of equity grants this mode of relief will best illustrate the scope of its jurisdiction.[1]

Equity will restrain proceedings on an instrument obtained by fraud or undue influence.

Where an instrument has been obtained by fraud, or undue influence, the court of equity will restrain proceedings at law on it. Thus, where a young man, an officer in the army, soon after coming of age, became liable upon bills of exchange, for the accommodation of his superior officer, to the defendant, a money-lender by profession; and upon negotiations for getting in the bills, the defendant agreed to postpone them for twelve months, and induced the plaintiff, upon representations of his trouble and expense in procuring the postponement of the bills, to give him, in consideration of such trouble and expense, a further promissory note; the court not finding in the answer a satisfactory explanation of these transactions, sustained an injunction against the defendant proceeding at law upon his securities.[2]

Onus on party who obtains an instrument under circumstances of suspicion to prove *bona fides*.

Where assets have been lost by an executor or administrator without his default, equity will restrain proceedings at law by creditors.

Suppose again, an executor or administrator should be in possession of abundant assets to pay all the debts of the deceased, and by an accidental fire, or by a robbery, without any default on his part, a great portion of them should be destroyed, so that the estate should be deeply insolvent; in such a case he might be sued by a creditor at law, and would have no defence; for when he once becomes chargeable with the assets at law, he is for ever chargeable, notwithstanding any intervening casualties. But courts of equity will restrain proceedings at law, in cases of this sort, upon the purest principles of justice.[3]

[1] St. 882.

[2] *Lloyd* v. *Clark*, 6 Beav. 309; *Tyler* v. *Yates*, L. R. 11 Eq. 265.

[3] *Crosse* v. *Smith*, 7 East, 258; *Croft* v. *Lyndsey*, Freem. Ch. 1.

So again, where a party has only an equitable title, a plaintiff at law, having only a legal title, will be restrained from pursuing that title in a court of common law. Thus, in *Newlands* v. *Paynter*,[1] personal chattels were bequeathed to a single woman for her separate use, but without the intervention of trustees; upon her marriage this property was taken in execution for the debt of her husband, who, in law, was deemed the legal owner; it was held, however, that the husband was a trustee for his wife, and an injunction was issued to restrain the sale under the writ.[2]

A party who has only an equitable title protected against one who has a bare legal title. Husband a trustee for wife of her separate property not vested in other trustees.

It is a very old head of equity that, if one person makes a representation to another, as an inducement to him to act, and he thereupon acts upon the faith of that representation, the former shall make it good. A., the lessee of a building lease, in which there was a covenant to erect houses on three plots of land in a specified manner, sold one of the houses to the plaintiff, to whom he represented that he was restricted from building, so as to obstruct the sea view. B. was also induced by similar representations, and the covenant was contained in the lease, to take a sublease of part of the ground. A. then surrendered the old lease to his lessor, and a new lease without the restrictive covenant was granted to him in lieu thereof; and A. commenced building, contrary to the original covenant. Upon a bill filed by the plaintiff, it was held that he was entitled to an injunction.[3] It has upon similar principles been held that where a person claiming a title in himself, is privy to the fact that another party is dealing with the property as his own, he will be restrained from asserting his own title against a title created by such other person, although he derives no benefit from the transaction.[4] And the same

If a representation be made, inducing another to do an act, it must be made good.

A party claiming a title in himself, and standing by while another deals with the property as his own, restrained.

[1] 4 My. & Cr. 408.
[2] *Langton* v. *Horton*, 3 Beav. 464; *Pyke* v. *Northwood*, 1 Beav. 152.
[3] *Piggott* v. *Stratton*, 1 De G. F. & Jo. 33; *Slim* v. *Croucher*, 1 De G. F. & Jo. 518.
[4] *Nicholson* v. *Hooper*, 4 My. & Cr. 186.

doctrine is applicable where a person having a title to an estate stands by and suffers a person ignorant of it to expend money upon the estate. In such cases, the person who has so expended money will, in equity, be indemnified for his expenditure on eviction by the real owner, for it would be inequitable for him to profit by his own fraud.[1]

Injunction on a creditor's bill for administration.

Another class of cases in which injunctions are granted against proceedings at law, is where there has already been a decree upon a creditor's bill for the administration of assets. Such a decree is considered in equity to be in the nature of a judgment for all the creditors; and, therefore, if subsequently to it a bond creditor should sue at law, the court of equity in which the decree is made will, in the assertion of its jurisdiction, restrain him from proceeding in his suit.[2]

A party cannot bring several suits for one and the same purpose. Except in the case of mortgagees.

A party will not be permitted to sue for the same thing and for the same purpose, in equity as well as in another court, but will be put to his election to sue in one or the other.[3] The only exception to this general rule being in the case of a mortgagee who may pursue all his remedies, whether at law or in equity, at the same time.[4]

Equity protects its own officers who execute the processes of the court.

Courts of equity will grant an injunction to protect their own officers, who execute their processes against any suits brought against them for acts done under or in virtue of such processes. The ground of this assertion of jurisdiction is, that courts of equity will not suffer their processes to be examined by any other

[1] *Neesom* v. *Clarkson*, 4 Hare, 97; *Dann* v. *Spurrier*, 7 Ves. 235.
[2] *Morrice* v. *Bank of England*, Cas. t. Talb. 217; *Perry* v. *Phelips*, 10 Ves. 38, 39; *Burles* v. *Popplewell*, 10 Sim. 383.
[3] *Vaughan* v. *Welsh*, Mos. 210; *Gedye* v. *Montrose*, 5 W. R. 537.
[4] See *Palmer* v. *Hendrie*, 27 Beav. 349; *Schoole* v. *Sall*, 1 S. & L. 176.

courts. If they are irregular, it is the duty of courts of equity themselves to apply the proper remedy.[1]

In what cases equity will not stay proceedings at law.

In criminal matters, or in matters not *purely civil.*

There are, however, cases in which courts of equity will not exercise any jurisdiction by way of injunction to stay proceedings at law. In the first place, they will not interfere to stay proceedings in any criminal matters, or in cases not strictly of a civil nature; as for instance, on an indictment, or a mandamus, or an information.[2] But this restriction applies only to cases where the parties seeking redress by such proceedings are not the plaintiffs in equity; for if they are, the court possesses power to restrain them personally from proceeding at the same time upon the same matter of right for redress in the form of a civil suit and of a criminal prosecution.[3]

Where the ground of defence was equally available at law.

A court of equity has no jurisdiction to relieve a plaintiff against a judgment at law where the case in equity proceeds upon a ground equally available at law and in equity, unless the plaintiff can establish some special equitable ground for relief.[4] And now that equitable defences can be pleaded at common law, still less will equity give relief.[5] It is no ground for equitable interference that a party has not effectually availed himself of a defence at law, or that a court of law has erroneously decided a point of pure law.[6]

As a rule a matter duly adjudicated on by a common law court cannot be re-opened in equity.

"It is not sufficient," says Lord Redesdale, "to show that injustice has been done, but that it has been done under circumstances that authorise the court to interfere. Because if a matter has already

[1] St. 891; *May* v. *Hook*, cited 2 Dick. 619; *Walker* v. *Micklethwait*, 1 Dr. & Sm. 49; *Re James Campbell*, 3 De G. M. & G. 585.

[2] *Holderstaffe* v. *Saunders*, 6 Mod. 16; *Montague* v. *Dudman*, 2 Ves. 396.

[3] *Mayor of York* v. *Pilkington*, 2 Atk. 302; St. 893.

[4] *Harrison* v. *Nettleship*, 2 My. & K. 423.

[5] *Farebrother* v. *Welchman*, 3 Drew. 122.

[6] *Simpson* v. *Howden*, 3 My. & Cr. 108; *Protheroe* v. *Forman*, 2 Swanst. 227, 233; *Ware* v. *Horwood*, 14 Ves. 31.

been investigated in a court of justice, according to the common and ordinary rules of investigation, a court of equity cannot take on itself to enter into it again. Rules are established, some by the legislature, some by the courts themselves, for the purpose of putting an end to litigation. And it is more important that an end should be put to litigation than that justice should be done in every case. The inattention of parties in a court of law can scarcely be made a subject for the interference of a court of equity. There may be cases cognisable at law, and also in equity, and of which cognisance cannot be effectually taken at law; and, therefore, equity does sometimes interfere, as in cases of complicated accounts, where the party has not made defence, because it was impossible for him to do it effectually at law. So where a verdict has been obtained by fraud, or where a party has possessed himself improperly of something, by means of which he has an unconscientious advantage at law, which equity will either put out of the way or restrain him from using. But without circumstances of that kind, I do not know that equity ever does interfere to grant a trial of a matter which has been already discussed in a court of law, a matter capable of being discussed there, and over which a court of law had full jurisdiction."[1]

Except in cases of fraud, or other special circumstances.

Equitable defences allowed at common law.

By the Common Law Procedure Act, 1854,[2] the courts of common law have power to receive pleas of defence on equitable grounds. The equitable plea, however, will only be admissible in such cases as, having regard to the machinery of the courts of law and the forms of the proceedings therein, complete justice can thereby be done between the parties. In all such cases, therefore, where the defendant will be only entitled to such a modified relief as cannot pro-

[1] *Bateman* v. *Willoe*, 1 Sch. & Lef. 204-206; *Leitch* v. *Leitch*, 11 Gr. 81.

[2] 17 & 18 Vict. c. 125, s. 83.

perly be dealt with by a court of law, he will still have to resort to a court of equity. In *Jeffs* v. *Day*,[1] Blackburn, J., says, "Under the Common Law Procedure Act, 1854, we have jurisdiction to entertain equitable defences; but we can only allow such pleas to be pleaded as, if proved, would be a simple bar to the action, and would entitle the defendant to the common law judgment, 'that the plaintiff take nothing by his writ, and that the defendant go thereof without day,' which would in effect be equivalent to a *perpetual injunction* in a court of equity."

But only in cases in which courts of equity would grant an unconditional and perpetual injunction.

Although there is an equitable defence at law, the defendant cannot be compelled to plead such equitable defence, but may at once come into equity for an injunction to restrain the action. The Act is only permissive. To say that where a man has a good equitable defence he must proceed at law, and plead that equitable defence, is in effect to make imperative that which the legislature has made optional.[2]

Defendant cannot be compelled to plead an equitable defence at law.

II. Injunctions to restrain wrongful acts of a special nature.

II. Injunctions against wrongful acts of a special nature. Two classes.

The equitable jurisdiction under this head may be divided into two classes.

1. Injunctions to enforce a contract or to forbid a breach of it.

2. Injunctions to prevent a violation of the rights of other parties independently of mere contract.

1. With reference to injunctions to enforce a contract, or to forbid a violation of its terms, the jurisdiction of equity may almost be said to be co-extensive

1. Injunction in cases of contract.

[1] L. R., 1 Q. B. 374.

[2] *Gompertz* v. *Pooley*, 4 Drew. 453; *Kingsford* v. *Swinford*, 28 L. J. Ch. 413.

Supplemental to the jurisdiction to compel specific performance.

with its power to compel specific performance. Whatever duty a court of equity will compel a party to perform, it will generally, on the other hand, restrain him from violating.[1] And in many cases, where from the nature of the subject-matter, the court does not decree specific performance, on the ground of its inability to carry such decree into effect, it will grant an injunction to restrain the doing of an act contrary to the tenor of the contract; and in effect, though indirectly, compels a specific performance of the contract. Thus in the case of *Catt* v. *Tourle*,[2] the plaintiff, a brewer, sold a piece of land to the trustees of a freehold land society, who covenanted that he should have the exclusive right of supplying beer to any public-house erected on the land so sold. The defendant, a member of the society, who was also a brewer, acquired a portion of the land, with notice of the covenant, and erected on it a public-house, which he supplied with his own beer. On a bill filed to restrain the defendant from supplying beer, the court held that the covenant, though in terms positive, was in substance negative, and granted an injunction accordingly.

Injunction a mode of specific performance of negative agreements.

It is evident that where a contract is not to do a thing, which contract is capable of being enforced in equity, it may be, and naturally is, enforced by the court by means of an injunction restraining the doing of that act.[3] Therefore, where articles were executed by the plaintiffs, who resided very near the church of Hammersmith, and the parson, churchwardens, overseers, and some other inhabitants of the parish, by which the plaintiffs covenanted to erect a new cupola, clock, and bell to the church; and the other parties covenanted that a bell which had been daily rung at five o'clock in the morning, to the great annoyance of

[1] Drew. on Injunctions, 250.
[2] L. R. 4 Ch. 654.
[3] *Lumley* v. *Wagner*, 1 De G. M. & G. 615.

the plaintiffs, should not be rung during the lives of the plaintiffs, or the survivors of them; the plaintiffs performed their part of the agreement, but the bell, after two years, was rung again: the agreement was specifically enforced against the parish authorities by means of an injunction.[1]

Court of equity may restrain the breach of part of an agreement, though it cannot compel specific performance of the other.

It seems to be now settled that the inability of equity to compel the specific performance of one part of an agreement is not *per se* a ground for its refusing to enjoin against the breach of another part of the agreement. Thus, in *Lumley* v. *Wagner*,[2] J. W. agreed with W. L. that she would sing at B. L.'s theatre during a certain period of time, and would not sing elsewhere without his written authority. The court granted an injunction against J. W. singing at a rival theatre. The Lord Chancellor said, "The present is a mixed case, consisting not of two correlative acts to be done, one by the plaintiff, and the other by the defendant, ... but of an act to be done by J. W. alone, to which is superadded a negative stipulation on her part to abstain from the commission of any act which will break in upon her affirmative covenant, the one being ancillary to, concurrent, and operating together with the other. The agreement to sing for the plaintiff during three months at his theatre, and during that time not to sing for anybody else, is not a correlative contract; it is in effect one contract; and though beyond all doubt this court could not interfere to enforce the specific performance of the whole of this contract, yet in all sound construction, and according to the true spirit of the agreement, the engagement to perform for three months at one theatre must necessarily exclude the right to perform at the same time at another theatre.

[1] *Martin* v. *Nutkin*, 2 P. Wms. 266; *Barret* v. *Blagrave*, 5 Ves. 555; S. C. 6 Ves. 104; Fry on Spec. Perf. 329.

[2] 1 De. G. M. & G. 616.

"It was objected that the operation of the injunction in the present case was mischievous, excluding the defendant, J. W., from any other theatre, while the court had no power to compel her to perform at Her Majesty's Theatre. It is true that I have not the means of compelling her to sing, but she has no cause of complaint if I compel her to abstain from the commission of an act which she has bound herself not to do, and thus possibly cause her to fulfil her engagement. The jurisdiction which I now exercise is wholly within the power of the court; and being of opinion that it is a proper case for interfering, I shall leave nothing unsatisfied by the judgment I pronounce."

No specific performance where court cannot secure performance by the plaintiff.

But where the terms of a contract are such that the court cannot superintend so as to secure the performance by a plaintiff on his part, it will not decree specific performance; and if on non-performance by a plaintiff, both parties cannot have equal justice, it will not, in the absence of an express negative covenant, and where the contract cannot be split into two separate and independent portions, and the negative part enforced, grant an injunction to restrain acts, the doing of which is inconsistent with the maintenance of the contract.[1]

2. Injunctions in special cases, independent of contract. Wherever there is a right, there is a remedy for its breach, if the right be cognisable by a court of justice.

2. Injunctions to prevent a violation of the rights of other parties, independently of mere contracts.

It may be laid down as a general rule that wherever a right exists, or is created, a violation of that right will be prohibited, subject to the limitation that the right is such an one as is cognisable by the law. It follows, therefore, that the restraining process of equity will apply to the whole range of rights and duties

[1] Joyce on Injunctions, 204; *Peto* v. *Brighton, Uckfield, & Tunbridge Wells Railway Company*, 11 W. R. 874.

which are recognised as enforceable by law. And it must also be remembered that though the jurisdiction of equity is in principle so extensive, it is restrained and modified by considerations of expediency and convenience; and that equity will not interfere where the breach of a duty, or the violation of a right, may be completely and adequately paid for by damages at law. It is proposed now to consider a few of the more important and common cases in which equity interferes by injunction to restrain breaches of duty or violations of right.

Equity will not interfere where legal remedy is complete.

1. In cases of waste.

1. Jurisdiction in cases of waste.

Waste may be defined as the destructive or material alteration of things forming an essential part of the inheritance.[1]

Arose from incompetency of common law.

Common law powers over waste.

The jurisdiction of equity to restrain waste arose, as in most other cases, from the incompetency of the common law to give adequate relief. The jurisdiction at common law with regard to waste may be thus shortly stated. By the Statutes of Marlebridge,[2] of Gloucester,[3] and of Westminster,[4] a writ of waste may be brought by him who hath the immediate estate of inheritance in reversion or remainder against the tenant for life, tenant in dower, tenant by the courtesy, or tenant for years; it may also be brought by one tenant in common or joint-tenant against another who wastes the estate held in common or joint-tenancy. But it does not lie between *co-parceners*.[5]

In what cases equity interferes.

But courts of equity have by no means limited themselves to an interference in cases of this sort. They have extended this salutary relief to cases

[1] Tudor's Real Property Cases, 90.
[2] 52 Hen. III.
[3] 6 Edw. I. c. 5.
[4] 13 Edw. I. c. 22.
[5] 3 Black. Com. 227, 228; *Jefferson* v. *Bishop of Durham*, 1 Bos. & Pull. 120.

where the remedies provided in the courts of common law cannot be made to apply; and where the titles of the parties are purely of an equitable nature; and where the waste is what is commonly, although with no great propriety of language, termed equitable waste,[1] meaning acts which are deemed waste only in courts of equity; and where no waste has been actually committed, but is only meditated or apprehended, equity will interfere by a bill *quia timet*.[2]

Equitable waste.

Cases where a person is dispunishable at law.

In the first place, there are many cases where a person is dispunishable at law for committing waste, and yet a court of equity will enjoin him. As where there is a tenant for life, remainder for life, remainder in fee, the tenant for life will be restrained by injunction from committing waste; although, if he did commit waste, no action of waste could lie against him by the remainder-man for life, for he has not the inheritance; nor by the remainder-man in fee, by reason of the interposed remainder for life.[3]

As where a tenant for life abuses his legal right to commit waste.

So where a tenant for life holds his estate without impeachment of waste, he may fell timber, open new mines or pits, and will have full property in the produce.[4] This is his legal right, and if, in exercising that right, he is guilty of malicious, extravagant, and capricious waste, such as pulling down and dismantling a mansion-house,[5] or felling timber planted or left standing for ornament or shelter of a mansion-house or grounds,[6] though there is no remedy at common law, he will be restrained in equity. And the

[1] *Downshire* v. *Sandys*, 6 Ves. 109, 110.
[2] St. 912.
[3] *Garth* v. *Cotton*, 1 Ves. Sr. 524, 555. s. c. 2 L. C. 623.
[4] Co. Litt. 220 *a*; Lewis Bowles's Case, 11 Co. 79 *b*.
[5] *Vane* v. *Barnard*, 2 Vern. 738.
[6] *Rolt* v. *Somerville*, 2 Eq. Ca. Abr. 759; *Morris* v. *Morris*, 15 Sim. 505; *Micklethwaite* v. *Micklethwaite*, 1 De G. & Jo. 519.

same rule will be applied to a tenant in tail after possibility of issue extinct, who has the same power to commit waste as a tenant for life, without impeachment of waste.[1] Tenant in tail after possibility of issue extinct.

In the next place, courts of equity will grant an injunction in cases where the aggrieved party has a purely equitable right, and, indeed, it has been said that these courts will grant it more strongly where there is a trust-estate.[2] Thus, for instance, in cases of mortgages, if the mortgagor in possession should fell timber on the estate, and thereby the security would become insufficient, but not otherwise, a court of equity will restrain the mortgagor by injunction.[3] On the other hand, a mortgagee in possession will not be permitted to waste the estate, unless the security prove defective, in which case the court will not restrain him from felling timber, the produce being, of course, applied in ease of the estate.[4] Cases where the aggrieved party has purely an equitable title. Mortgagor and mortgagee.

It seems that courts of equity have no jurisdiction in cases of permissive waste by a tenant for life having the legal estate;[5] permissive waste being defined as an act of omission—as not doing repairs, whereby houses are suffered to fall into decay.[6] Permissive waste not remediable in equity.

2. In cases of nuisances. 2. Nuisances.

In cases of public nuisances, properly so called, an indictment lies to abate them, and punish the offenders. But an information also lies in equity to redress the grievance by way of injunction. Thus informations have been maintained against a public nuisance by stopping a highway. But the question of nuisance or Public nuisances abated by indictment, but sometimes also by an injunction on information filed.

[1] *Att. Gen.* v. *D. of Marlborough*, 3 Madd. 538; *Abrahall* v. *Bubb*, 2 Swanst. 172.
[2] *Robinson* v. *Litton*, 3 Atk. 209.
[3] *King* v. *Smith*, 2 Hare, 239; *Russ* v. *Mills*, 7 Gr. 145.
[4] *Witherington* v. *Banks*, Sel. Ch. Ca. 31.
[5] *Powys* v. *Blagrave*, Kay, 495; 4 De G. M. & G. 448.
[6] Inst. 145.

not must, in cases of doubt, be tried by a jury; and the injunction will be granted or not as that fact is decided.[1]

Public nuisance causing special damage.

As a rule, a suit of this nature is instituted by the Attorney-General, or he is made a party, as representing the public. But when a private person suffers a special and peculiar injury distinct from that of the public in general, in consequence of a public nuisance, he will be entitled to an injunction and relief in equity, which may thus compel the wrong-doer to take active measures against allowing the injury to continue,[2] and in such a case the Attorney-General need not be a party.[3]

Equity has jurisdiction in cases of private nuisances.

In regard to private nuisances the interference of courts of equity by way of injunction is undoubtedly founded upon the ground of restraining irreparable mischief, or of suppressing vexatious and interminable litigation, or of preventing multiplicity of suits. It is not every nuisance which will justify the interposition of a court of equity. There must be such an injury as

But it will not interfere, where it can be compensated by damages.

from its nature is not susceptible of being adequately compensated by damages at law, or such as, from its continuance or permanently mischievous character, must occasion a constantly recurring grievance, which cannot be otherwise prevented, save by an injunction.[4] Thus it has been said, that every common trespass is not a foundation for an injunction, where it is only contingent, fugitive, or temporary. But if it is continued so long as to become a nuisance, the person committing it ought to be restrained. So a mere diminution of the value of property by a nuisance, without irreparable mischief, will not furnish any foundation for equitable relief.[5]

[1] St. 923; *Att.-Gen.* v. *Cleaver*, 18 Ves. 217; *Ripon* v. *Hobart*, 3 My. & K. 169, 179.

[2] St. 924 *a*.

[3] *Wood* v. *Sutcliffe*, 2 Sim. N. S. 163.

[4] *Fishmonger's Co.* v. *East India Co.* 1 Dick. 163.

[5] *Att.-Gen.* v. *Nichol*, 16 Ves. 342; St. 925.

On the other hand, where the injury is irreparable, as where loss of health,[1] loss of trade, destruction of the means of subsistence, or permanent ruin to property, may or will ensue from the wrongful act, in every such case courts of equity will interfere by injunction.[2] Thus, for example, where a party builds so near the house of another party as to darken his windows, against the clear rights of the latter, either by contract or by ancient possession, courts of equity will interfere by injunction to prevent the nuisance, as well as to remedy it, if already done. The injury is material, and operates daily to destroy or diminish the comfort and use of the adjoining house; and the remedy by a multiplicity of actions for the continuance of it would furnish no substantial compensation.[3]

Where injury is irreparable.

Darkening ancient lights.

Upon the same principle it has been held that a landowner has a right, independent of prescription, to the lateral support of his neighbour's land, so far as that is necessary to sustain the soil of his land in its natural state, and also to compensation for damages caused either to the land or buildings upon it by the withdrawal of such support, it being established that the additional weight of the buildings had nothing to do with the subsistence of the soil. And it would seem also, that he may acquire, by twenty years' enjoyment, the right to lateral support for the buildings also erected on the land.[4]

Right to lateral support of soil.

Of soil with buildings on it.

So equity will interfere to prevent the pollution of streams, causing injury to the riparian owners. In *Att.-Gen.* v. *Borough of Birmingham*,[5] Wood, V. C., thus expresses himself, "Now the plaintiff's rights are these: he has a clear right to enjoy the river, which,

Pollution of streams.

[1] *Walter* v. *Selfe*, 20 L. J. Ch. 433.
[2] *Wynstanley* v. *Lee*, 2 Swanst. 335; *Broadbent* v. *Imp. Gas. Co.* 7 De G. M. & G. 436.
[3] *Att.-Gen.* v. *Nichol*, 16 Ves. 338; *Wynstanley* v. *Lee*, 2 Swanst. 335; St. 926.
[4] *Hunt* v. *Peake*, Johns. 705 St. 927 *a*.
[5] 4 K. & J. 546.

before the defendant's operations, flowed unpolluted—or, at all events, so far unpolluted that fish could live in the stream, and cattle would drink of it—through his grounds, for three miles, and upwards, in exactly the same condition in which it flowed formerly, so that cattle may drink of it without injury, and fish, which were accustomed to frequent it, may not be driven elsewhere. . . . . As regards the discretion the court should exercise where such right exists, if the plaintiff finds the river so polluted as to be a continuous injury to him; if, in order to assert his right, he would be obliged to bring a series of actions, one every day of his life, in respect of every additional injury to his cattle, or every additional annoyance to himself (not to mention the permanent injury which he would sustain in having the water—which, as it passes along the course of his land, is his property—so damaged that he cannot use it), then the court will properly exercise its discretion by granting an injunction to relieve him from the necessity of bringing a series of actions, in order to obtain the damages to which such continual and daily annoyance entitles him."

Plaintiff would otherwise have to bring a series of actions.

3. Patents, copyright, and trade-marks.

3. Cases of patents, copyright, and trade-marks.

It is in order to prevent irreparable mischief, or to suppress multiplicity of suits and vexatious litigation, that courts of equity interfere in cases of patents for inventions, and in cases of copyrights to secure the rights of the inventor or author.[1]

Damages at law utterly inadequate.

It is quite plain that if no other remedy could be given in cases of patent and copyright than an action at law for damages, the inventor or author might be ruined by the necessity of perpetual litigation, without ever being able to have a final establishment of his rights. Besides, in cases of this nature, mere damages would often give no adequate relief. For example, in

[1] St. 930.

the case of a copyright, the sale of copies by the defendant is not only in each instance taking from the author the profit upon the individual book, which he might otherwise have sold, but it may also be injuring him to an incalculable extent in regard to the value and disposition of his copyright, which no inquiry for the purpose of damages could fully ascertain.[1]

Jurisdiction in copyright when exercised.

The jurisdiction will be exercised in all cases where there is a clear colour of title, founded upon long possession and assertion of right. Even an equitable interest, limited in point of time or extent, is sufficient. But a mere agent to sell has not such a real interest in a work as will entitle him to relief.[2] The question of piracy or no piracy is at the present day usually decided by the court, on a personal inspection of the book; but if necessary, an issue will be directed at law.[3]

In cases of patents, injunction is not a matter of course, depends on circumstances. Has its validity been established at law?

In cases, however, where a patent has been granted for an invention, it is not a matter of course for courts of equity to interpose by way of injunction. If the patent has been but recently granted, and its validity has not been ascertained by a trial at law, the court will not generally act upon its own notions of the validity or invalidity of the patent, and grant an immediate injunction; but it will require it to be ascertained by a trial in a court of law if the defendant denies its validity, or puts the matter in doubt.[4] But if the patent has been granted for some length of time, and the patentee has put the invention into public use, and has had an exclusive possession of it under his patent for a period of time, which may fairly create the presumption of an exclusive

Has it been in existence for a long time?

[1] St. 931, 932; *Hogg* v. *Kirby*, 8 Ves. 223.

[2] *Nichol* v. *Stockdale*, 3 Swanst. 687.

[3] Copinger on Copyright, 118 119.

[4] *Martin* v. *Wright*, 6 Sim. 297; *Saunders* v. *Smith*, 3 My. & Cr. 711, 728.

right, the court will ordinarily interfere by way of injunction.[1]

Three courses open to the court in such a case.

The course pursued by the court in granting an injunction in such cases is thus laid down by Lord Cottenham in *Bacon* v. *Jones*:[2] "When a party applies for the aid of the court, the application for an injunction is made either during the progress of the suit, or at the hearing; and in both cases, I apprehend, great latitude and discretion are allowed to the court in dealing with the application. Where the application is for an interlocutory injunction, several courses are open; the court may at once grant the injunction *simpliciter*, without more—a course which, though perfectly competent to the court, is not very likely to be taken where the defendant raises a question as to the validity of the plaintiff's title; or it may follow the more usual, and, as I apprehend, more wholesome practice, in such a case, of either granting an injunction, and at the same time directing the plaintiff to proceed to establish his legal title, or of requiring him first to establish his title at law, and suspending the grant of the injunction until the result of the legal investigation has been ascertained, the defendant in the meantime keeping an account."

Injunction *simpliciter*.

Injunction, with direction that plaintiff establish his title at law.

Injunction withheld until plaintiff establish his title at law, defendant keeping an account.

No copyright in irreligious, immoral, or libellous works.

There are some peculiar principles applicable to cases of copyright, which are not generally applicable to patents for inventions. In the first place, no copyright can exist consistently with principles of public policy in any work of a clearly irreligious, immoral, libellous, or obscene description. Further, in order to establish such a claim, the author must in the first place show a right to sell, and this he cannot do, he himself being unable to acquire a property therein.[3]

[1] St. 934.
[2] 4 My. & Cr. 433, 436.
[3] Copinger on Copyright, 48.

In the case of an asserted piracy of such a work, if it be a matter of any real doubt whether it falls within such a description or not, courts of equity will not interfere by injunction to prevent or restrain the piracy, but will leave the party to his remedy at law.[1]

What is an infringement of copyright.

In the next place, in cases of copyright, difficulties often arise in ascertaining whether there has been actual infringement thereof. It is, for instance, clearly settled not to be an infringement of the copyright of a book to make *bonâ fide* quotations or extracts from it, or a *bonâ fide* abridgment of it, or to make a *bonâ fide* use of the same common materials in the composition of another work. But what constitutes a *bonâ fide* use of extracts, or a *bonâ fide* abridgment, or a *bonâ fide* use of common materials, is often a matter of most embarrassing inquiry. The true question, it has been said, in all these cases, is, whether there has been a legitimate use of the copyright publication, by the fair exercise of a mental operation deserving the character of a new work.[2] But if one, instead of searching into the common sources, and obtaining his materials from them, should avail himself of the labour of his predecessor, and adopt his arrangement, or do it with only a colourable variation, it would be an infringement of the copyright. But it is no infringement where an author has been led by an earlier writer to consult authorities referred to by him, even though he may quote the same passages from those authorities which were used by the earlier writer.[3]

Bonâ fide quotations, a *bonâ fide* abridgment, or *bonâ fide* use of common materials, not an infringement.

Identical quotations.

Maps, calendars, tables, &c.

The general doctrine on copyright in publications of the class of maps, road books, calendars, chronological

[1] St. 936; *Lawrence* v. *Smith*, Jacob, 472; *Walcot* v. *Walker*, 7 Ves. 1.

[2] St. 939; *Campbell* v. *Scott*, 11 Sim. 31; *Lewis* v. *Fullarton*, 2 Beav. 6.

[3] *Pike* v. *Nicholas*, L. R. 5 Ch. 251.

and other tables, is not very easily reducible to any accurate definition. Here the materials being equally open to all, there must be a close identity or similitude in the very form and use of the common materials. The difficulty here is to distinguish what belongs to the exclusive labours of a single mind, from what are the common sources of the materials of the knowledge used by all. Suppose, for instance, the case of maps; one man may publish the map of a country; another man, with the same design, if he has equal skill and opportunity, may by his own labour produce almost a fac-simile. He has certainly a right so to do. But he is not at liberty to copy that map, and claim it as his own. He may work on the same original materials; but he cannot exclusively and evasively use those already collected and embodied by the skill, industry, and expenditure of another. The fact of copy or no copy is generally ascertained, in the absence of direct evidence, by the appearance in the alleged copy of the same inaccuracies or blunders that are to be found in the first published work. But this is a mode of inference which must be applied with caution.[1]

Identity of errors a ground for suspecting piracy.

Copyright in lectures.

In *Abernethy* v. *Hutchinson*,[2] it was held that when persons are admitted as pupils or otherwise to hear lectures, although they were orally delivered, and although the parties might go to the extent of putting down the whole by means of shorthand, yet they can do that only for the purposes of their own information, and could not publish for profit that which they had not obtained the right of selling. And consequently another person, who, in the absence of evidence as to how he came by them, must in the opinion of the court have obtained them from a pupil, would be re-

[1] St. 940; *Wilkins* v. *Aikin*, 17 Ves. 424; *Longman* v. *Winchester*, 16 Ves. 269.

[2] 1 H. & Tw. 40; s. c. 3 L. J. Ch. 209.

strained. Copyright in lectures is now, under certain conditions, protected by legislative enactment.[1]

As to private letters, whether on literary subjects or on matters of private business, personal friendships or family concerns, a learned writer lays down the following conclusions :[2]— Copyright in letters on literary subjects, or private matters.

1. That the writer of private letters has such a qualified right of property in them as will entitle him to an injunction to restrain their publication by the party written to, or his assignees.[3] 1. The writer may restrain their publication.

2. That the party written to has such a qualified right of property in the letters written to him as will entitle him, or his personal representative, to restrain the publication of them by a stranger.[4] 2. The party written to may also restrain their publication by a stranger.

3. That such qualified rights may be displaced by reasons of public policy, or by some personal equity.[5] 3. Publication permitted on grounds of public policy.

An injunction will be granted to restrain the publication of an unpublished manuscript. This doctrine appears to have been first established in the case of the *Duke of Queensberry* v. *Shebbeare*.[6] In that case, the plaintiff claimed, as administrator of A., Lord Clarendon's descendant, to restrain the defendant from publishing the History of the Rebellion; and the defendant claimed, under a delivery by A. of the original manuscript to the father of another defendant, with permission to take a copy and make what use he thought fit of it. But it was held that it was not to be presumed that Lord Clarendon Injunction against publication of an unpublished manuscript.

[1] 5 & 6 Will. IV. c. 65.
[2] Drew. on Inj. 208, 209.
[3] St. 944–948; *Pope* v. *Curl*, 2 Atk. 342; *Gee* v. *Pritchard*, 2 Swanst. 402.
[4] *Granard* v. *Dunkin*, 1 Ball & Beat. 207; *Thompson* v. *Stanhope*, Amb. 737.
[5] *Percival* v. *Phipps*, 2 V. & B. 19; Joyce on Injunctions, 351–2.
[6] 2 Eden. 329; Copinger on Copyright, 24–33.

meant the defendant's ancestor to have the profit of multiplying the work in print, though he might make any other use of it except that.[1]

Injunction against use of trade-marks does not depend on property, but because equity will not permit fraud.

The right tested by its violation.

With regard to the use of trade-marks, and generally to the enjoyment of a particular trade designation, the right to protection does not seem to depend upon a property in them, but on the principle that the court will not allow fraud to be practised upon private individuals or upon the public. "This right cannot properly be described as a copyright; it is, in fact, a right which can be said to exist only, and can be tested only, by its violation: it is the right which any person, designating his wares or commodities by a particular trade-mark, as it is called, has to prevent others from selling wares which are not his, marked with that trade-mark in order to mislead the public, and so incidentally to injure the person who is owner of the trade-mark."[2] The principle will be seen by a comparison of the following cases. In *Burgess* v. *Burgess*,[3] where a father had for many years exclusively sold an article under the title of "Burgess's Essence of Anchovies," the court would not restrain his son from selling a similar article under that name, no fraud being proved. Knight Bruce, L.J., said:—"All the Queen's subjects have a right, if they will, to manufacture and sell pickles and sauces, and not the less that their fathers have done so before them. All the Queen's subjects have a right to sell these articles in their own names, and not the less so that they bear the same name as their fathers; nor is there anything else that this defendant has done in question before us. He follows the same trade as that his father follows, and has long followed, namely, that of manufacturer and seller of pickles, preserves,

Burgess v. *Burgess.*

A man cannot be restrained from using his own name as vendor of an article.

[1] *Prince Albert* v. *Strange*, 1 Mac. & G. 25; 1 H. & Tw. 1.
[2] *Farina* v. *Silverlock*, 6 De G. M. & G. 217.
[3] 3 De G. M. & G. 897.

and sauces; among them one called 'Essence of Anchovies.' He carries on in his own name, and sells his essence of anchovies as 'Burgess's Essence of Anchovies,' which, in truth, it is. If any circumstance of fraud, now material, had accompanied, and were continuing to accompany, the case, it would stand very differently. The whole ground of complaint is the great celebrity which, during many years, has been possessed by the elder Mr Burgess's essence of anchovies. That does not give him such exclusive right, such a monopoly, such a privilege, as to prevent any man from making essence of anchovies, and selling it under his own name." In the case of *Cocks* v. *Chandler*,[1] the bill was filed by the successor in title of the inventor of a sauce known as "Reading Sauce," to restrain a rival manufacturer from selling his preparation under the name of "The Original Reading Sauce;" and on proof by the plaintiff that he alone was entitled to the original receipt, and that on that ground his sauce had attained a high reputation in the market, an injunction was granted against the use by the defendant of the word "original," as being a device to mislead the public.

If there be no fraud on his part.

Cocks v. *Chandler*—Use of word "Original" a fraud on the public.

Before leaving this branch of the Concurrent Jurisdiction of the Court of Chancery, it is appropriate briefly to point out certain legislative enactments, which have to some considerable extent increased the power and usefulness of the Court of Chancery, by conferring on it powers hitherto exclusively belonging to the courts of common law.

By Sir Hugh Cairns' Act,[2] it is enacted that in all cases in which the court has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the com-

Sir Hugh Cairns' Act

[1] L. R. 11 Eq. 446; *Marshall* v. *Ross*, L. R. 8 Eq. 651; *Crawfurd* v. *Shuttock*, 13 Gr. 149; *Davis* v. *Kennedy*, 13 Gr. 523.

[2] 21 & 22 Vict. c. 27.

Equity may give damages where it has a jurisdiction to grant injunction or specific performance.

mission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured either in addition to, or in substitution for, such injunction, and such damages may be assessed in such manner as the court shall direct. By subsequent sections, provision is made for the assessment of damages, and the trial of questions of fact, either by a jury before the court itself, or by the court alone, or for the assessment of damages by a jury before any judge of one of the superior courts of common law, at *nisi prius*, or at the assizes, or before a sheriff, as is done in writs of inquiry at common law.[1]

May assess damages with or without a jury, or direct an issue.

Construction and effect of the act.

With reference to the construction and application of this act, the following points seem to be settled:—

1. Equity jurisdiction not extended where there is a plain common law remedy.

1. That the statute does not extend "the jurisdiction of the court to cases where there is a plain common law remedy, and where, before the statute, the court would not have interfered."[2]

2. Damages not given where the contract cannot be performed at all.

2. "Where a plaintiff comes to the court for the specific performance of a contract which cannot be performed at all, there damages cannot be given in lieu of specific performance."[3]

3. No relief where damages only are asked for.

3. So, again, there can be no relief in a court of equity "where a bill is filed for damages, and damages only."[4]

4. Where court may compel specific performance of one

4. Where a court has jurisdiction to compel specific performance of a part of a contract, it has also power under the statute to award damages for the breach of

[1] 21 & 22 Vict. c. 27 ss. 2–6.
[2] *Wicks* v. *Hunt*, Johnson, 380.
[3] Per Wood, V.-C., in *Middleton* v. *Magnay*, 2 H. & M. 236; *Rogers* v. *Challis*, 27 Beav. 175 *Scott* v. *Rayment*, L. R. 7 Eq. 112.
[4] *Middleton* v. *Magnay*, 2 H. & M. 237.

another part of that contract, in respect of which it could not have compelled specific performance. Thus, plaintiff agreed to grant a lease to defendant, when and so soon as he, the defendant, should have built a new house on the land; and the defendant agreed to accept such lease when required, and to pull down an old house then standing on the land, and build a new one on the site. It was held that the plaintiff was entitled to damages for the non-building of the house, and to specific performance of the contract to accept the lease. Wood, V.-C., said:—"Now, it is perfectly true that I cannot act until I have jurisdiction, and under the existing law, before the passing of this act, a court of equity had not jurisdiction in respect of a building contract of this description. But it would have had jurisdiction, before the passing of the act, to compel the defendant to accept a lease on the plaintiff waiving the condition which he for his own benefit inserted—that he should not be called upon to grant a lease until a certain time. The defendant has agreed to accept a lease when required, and the court has therefore jurisdiction. The statute would not apply to a case where the object of the agreement was simply the building of the house under such conditions and on such terms that, it may be assumed, the court could not grant specific performance; and, in such a case, a plaintiff could not file a bill to have damages instead of specific performance, because there would be no jurisdiction. But there is a distinct agreement here, not only to build the house, but to accept the lease. The court, having therefore acquired jurisdiction, may give damages, either in addition to or in substitution for specific performance. The meaning of the statute can only be, that, where the court has jurisdiction in the suit, it may award damages in substitution for specific performance."[1]

part of an agreement, it may give damages for breach of another part, which it could not have enforced.

A court of equity has no jurisdiction simply on a building contract.

If the court acquire jurisdiction it may give damages.

[1] *Soames* v. *Edge*, Johnson, 669; J. & S. 142. *Middleton* v. *Greenwood*, 2 D. G.

On the other hand, the courts of common law have been invested with equitable powers, in the nature of an injunction at equity; for by the 17 & 18 Vict., c. 125, s. 79, it is enacted that "in all cases of breach of contract or other injury, where the party injured is entitled to maintain, *and has brought an action*, he may, in like case and manner as hereinbefore provided with respect to *mandamus*, claim a writ of injunction against the repetition or continuance of such breach of contract or other injury, or the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right; and he may, in the same action, include a claim for damages or other redress."[1]

Injunction at common law.

An action must have been already commenced.

[1] *Mayall* v. *Higbey*, 31 L. J. Exch. 329; *Jessel* v. *Chaplin*, 2 Jur. N. S. Ex. 931.

CHAPTER XI.

PARTITION.

ANOTHER head of Concurrent Jurisdiction is that of partition of real estate, when held by joint-tenants or tenants in common.

Origin of jurisdiction.

The ground of this jurisdiction has been thus stated by Lord Redesdale: "In the case of partition of an estate, if the titles of the parties are in any degree complicated, the difficulties which have occurred in proceeding at the common law have led to applications to courts of equity for partitions, which are effected by first ascertaining the rights of the several persons interested, and then issuing a commission to make the partition required, and upon return of the commission, and confirmation of that return by the court, the partition is finally completed by mutual conveyances of the allotments made to the several parties."[1]

Writ of partition at law inadequate.

The common law remedy by writ of partition was at an early period found inadequate and incomplete, on account of the various and complicated interests which in process of time arise out of or attach to the ownership of real estate. Moreover, courts of law were content merely to declare the rights of the parties, and were incapable of effecting a partition by means of mutual conveyances. It is for these and other reasons, as the necessity of the discovery of titles, the difficulty of making the appropriate and indispensable compensatory adjustments, the peculiar

[1] Mitford on Pleading, 120.

remedial processes of courts of equity, and their ability to clear away all intermediate obstructions against complete justice, that these courts have assumed a general concurrent jurisdiction with courts of law in all cases of partition. And in so doing they have usually followed the analogies of the law; and will decree partition in such cases as the courts of law recognise as fit for their interference. But courts of equity are not, therefore, to be understood as limiting their jurisdiction in partition to cases cognisable or relievable at law; for there is no doubt that they may interfere in cases where a partition would not be at law; as, for instance, where an equitable title is set up.[1]

Reversioner cannot maintain suit for partition.

A suit for partition cannot be maintained by a person interested as a joint-tenant or tenant in common in reversion; and for this reason, that it would be unreasonable that a reversioner should be permitted to disturb the existing state of things, as where lands in the possession of a tenant for life become on his death divisible among several as tenants in common.[2] Nor even since the Partition Act 1868 will a bill lie, where the title being purely legal, the main purpose of the suit is not partition, but to prove the legal title.[3]

Nor person claiming under disputed legal title.

Provisions of Trustee Act 1850 when persons interested are under incapacity.

In suits for partition difficulties often arose owing to the incapacity of persons interested in the property, which it was desired should be divided. But now, where any decree has been made by the court for a partition, or for a sale in lieu of a partition,[4] of any lands, the court may declare that any of the parties to the suit, wherein the decree is made, are trustees of such lands, or any part thereof within the meaning

[1] St. 658; *Wills* v. *Slade*, 6 Ves. 498; *Cartwright* v. *Pulteney*, 2 Atk. 380.

[2] *Evans* v. *Bagshaw*, L. R. 8 Eq. 469; L. R. 5 Ch. 340.

[3] *Giffard* v. *Williams*, L. R. 5 Ch. 546.

[4] The Partition Act 1868 (31 & 32 Vict. c. 4), s. 7.

of the Trustee Act 1850; or that the interests of unborn persons who might claim under any party to the suit, or by other ways mentioned in the act, are the interests of persons who, upon coming into existence, would be trustees within the meaning of the act; and thereupon the Lord Chancellor, intrusted by the sign manual with the care of the persons and estates of lunatics, may, as to any lunatic or person of unsound mind, or the Court of Chancery may, in other cases, make such orders as to the estates, rights, and interests of such persons, born or unborn, as he or the court might, under the provisions of the act, make concerning the estates, rights, and interests of trustees, born or unborn.[1] Accordingly, if any of the persons interested are infants, lunatics, or persons of unsound mind, the court will carry into effect the decree for partition, by making an order vesting their shares in such persons as the court shall direct.[2]

Vesting order.

Formerly a partition was usually made by a commission issued to inspect and apportion the estate among the several persons entitled. Now, however, it is more usually made in chambers, or by the decree at the hearing.

Partition, how made.

Where the property is small, and the persons interested are many, the difficulties in the way of carrying a partition into effect were often so great, as to render the step the reverse of beneficial. The court in one case[3] directed the partition of a house, and the commission having been executed, an exception was taken by the defendant, on the ground that the commissioners had allotted to the plaintiff the whole stack of chimneys, all the fireplaces, the only staircase, and all the conveniences in the yard. The Lord Chancellor overruled the exception, saying that he did not

Difficulties, where property small, of carrying partition into effect.

[1] Trustee Act 1850 (13 & 14 Vict. c. 60), s. 30.

[2] *Ibid.*, ss. 3, 7, 30; Dan. Ch. Pr. 1031.

[3] *Turner* v. *Morgan*, 8 Ves. 143.

know how to make a better partition for them; that he granted the commission with great reluctance, but was bound by authority.

Now remedied by sale under Partition Act 1868.

These difficulties are now in great measure removed by the Partition Act 1868, by which it is provided, that if it appears to the court that, by reason of the nature of the property or of the number of the parties interested, or presumptively interested, or of the absence or disability of some of the parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial than a partition, the court may, if it thinks fit, on the request of any of the parties interested, and notwithstanding the dissent or disability of any others, direct a sale accordingly.[1]

[1] 31 & 32 Vict. c. 40, s. 3; Dan. Ch. Pr. 1019–1022.

CHAPTER XII.

INTERPLEADER.

Interpleader, where two or more persons claim the same thing from a third person.

WHERE two or more persons, whose titles are connected by reason of one being derived from the other, or of both being derived from a common source, claim the same thing, by different or separate interests, from a third person, and he, not knowing to which of the claimants he ought of right to render a debt or duty, or to deliver property in his custody, fears he may be hurt by some of them, he may exhibit a bill of interpleader against them. In this bill he must state his own rights and their several claims, and pray that they may interplead, so that the court may adjudge to whom the thing belongs, and he may be indemnified. If any suits of law are brought against him, he may also pray that the claimants may be restrained from proceeding till the right is determined.[1] And similarly an injunction will be granted in an interpleader suit, to restrain proceedings in another suit relating to the same subject-matter, imperfect in its frame for lack of parties.[2]

Suits at law may be restrained.

Imperfect suit in equity.

Interpleader at law only in cases of joint bailment.

The remedy by interpleader was not unknown to the common law; but it had a very narrow range of purpose and application. The interpleader at law only existed where there was a joint bailment by both parties.[3]

The true origin then of the jurisdiction in equity over interpleader is, that there is either no remedy at

[1] Mitford on Pleading, 58, 59; *Jones* v. *Thomas*, 2 Sm. & Giff. 186.

[2] *Prudential Assurance Company* v. *Thomas*, L. R. 3 Ch. 74.

[3] *Crawshay* v. *Thornton*, 2 My. & Cr. 1, 21.

law, or the legal remedy is inadequate in the given case.

Plaintiff to a bill of interpleader must have no personal interest in the subject-matter. Auctioneer claiming commission cannot maintain a suit.

In order that a party may be entitled to bring a bill for interpleader in equity, it is absolutely essential that he should have no personal interest in the subject-matter of contest. In *Mitchell* v. *Hayne*,[1] plaintiff was an auctioneer, and had sold an estate for one of the defendants. The other defendant was the purchaser, and had commenced an action against the plaintiff for the deposit; upon which the plaintiff prayed for an interpleader and injunction, offering, at the same time, to pay the deposit money into court, *after deducting* his commission. The Vice-Chancellor refused the bill, saying, "Interpleader is where the plaintiff is the holder of a stake which is equally contested by the defendants, as to which the party is wholly indifferent between the parties, and the right to which will be fully settled by interpleader between the defendants."[2]

Crawshay v. *Thornton.*

In the case of *Crawshay* v. *Thornton*,[3] A. deposited certain iron with B. & Co., who were wharfingers, and afterwards directed them to deliver it to C. C. applied to B. & Co. to know the particulars of the iron held by them on his account; and B. &. Co. then wrote a letter to C., saying, that in compliance with his request, they annexed a note of the landing weights of the iron transferred into his name by A., and now held by them (B. & Co.) at his (C.'s) disposal. B. & Co. subsequently received notice from D. that the iron belonged to him, and that it had been deposited with A. as an agent for sale, and that he without authority pledged it to C. B. & Co. then filed a bill of interpleader against C. and D. It was held that they could not maintain a bill of inter-

[1] 2 Sim. & Stu. 63.
[2] *Langston* v. *Boylston*, 2 Ves. Jr. 109.
[3] 2 My. & Cr. 1, 19.

pleader, for after their letter to C., C. had a right against them independently of the question whether D. was or was not entitled to the iron. The Lord Chancellor said, "The case tendered by every such bill of interpleader ought to be, that the whole of the rights claimed by the defendants may be properly determined by litigation between them; and that the plaintiffs are not under any liabilities to either of the defendants beyond those which arise from the title to the property in contest; because if the plaintiffs have come under any personal obligation, independently of the question of property, so that either of the defendants may recover against them at law without establishing a right to the property, it is obvious that no litigation between the defendants can ascertain their respective rights as against the plaintiffs; and the injunction, which is of course, if the case be a proper subject for interpleader, would deprive a defendant having such a case, beyond the question of property, of part of his legal remedy, with the possibility, at least, of failing in the contest with his co-defendant; in which case the injunction would deprive him of a legal right, without affording him any equivalent or compensation."

It is essential in an interpleader that the whole of the rights claimed by the defendants should be finally determined by the litigation. Interpleader not applicable if plaintiff is under a special personal liability to one of the defendants.

In regard to bills of interpleader, it is not necessary to entitle the party to come into equity that the title of the claimants should be both purely legal. It is sufficient to give jurisdiction, that the one title is legal, and the other is equitable.[1] Thus, for instance, if a debt or other claim has been assigned, and a controversy arises between the assignor and the assignee respecting the title, a bill of interpleader may be brought by the debtor to have the point settled to whom he shall pay.[2] Indeed where one of the claims is purely equitable, it seems formerly to

Interpleader where one title is legal and the other equitable.

Debt assigned.

Or where both are equitable.

[1] *Paris* v. *Gilham*, Coop. 56; *Morgan* v. *Marsack*, 2 Mer. 107.

[2] *Wright* v. *Ward*, 4 Russ. 215.

have been indispensable to come into equity; for in such a case there could be no interpleader awarded at law.[1] But since the Common Law Procedure Act 1860, courts of law will on an interpleader issue take into consideration the equitable rights of the parties.[2]

No interpleader in case of adverse independent titles not derived from the same common source.

In the case of adverse independent titles, not derived from the same common source, the party holding the property must, it seems, defend himself as well as he can at law; and he is not entitled to the assistance of a court of equity, for that would be to assume the right to try merely legal titles upon a controversy between different parties where there is no privity of contract between them and the third person who calls for an interpleader.[3]

Agent cannot have interpleader against his principal.

It is a settled rule of law, and of equity also, that an agent shall not be allowed to dispute the title of his principal to property which he has received from or for his principal; or to say that he will hold it for the benefit of a stranger.[4] But this doctrine is to be taken with its proper qualifications. For if the principal has created an interest or a lien on the funds in the hands of the agent in favour of a third person, and the nature and extent of that interest or lien is in controversy between the principal and such third person, then the agent may, for his own protection, file a bill of interpleader, to compel them to litigate and adjust their respective titles to the fund.[5]

Except where principal has created a lien in favour of a third party.

Again, a tenant cannot file a bill of interpleader

[1] *Bolton* v. *Williams*, 4 Bro. C. C. 309.

[2] *Rusden* v. *Pope*, L. R. 3 Ex. 269.

[3] St. 816, 820; *Pearson* v. *Cardon*, 2 Russ. & My. 606, 610.

[4] St. 817; *Dixon* v. *Hamond*, 2 B. & Ald. 313; *Nicholson* v. *Knowles*, 5 Madd. 47.

[5] St. 817 *a*; *Smith* v. *Hammond*, 6 Sim. 10; *Wright* v. *Ward*, 4 Russ. 215, 220.

against his landlord on notice of ejectment by a stranger under an adverse title to that of the landlord. "The reason is manifest; for upon the definition of it, a bill of interpleader is where two persons claim of a third the same debt, or the same duty. With regard to the relation of landlord and tenant, the right must be the object of an ejectment. The law has taken such anxious care to settle their rights arising out of that relation, that the tenant attacked throws himself upon his landlord. He has nothing to do with any claim adverse to his landlord. He puts the landlord in his place. If the landlord does not defend for him, he recovers upon his lease a recompense against the landlord. In the case of another person claiming against the title of his landlord, it is clear, unless he derives under the title of the landlord, he cannot claim the same debt. The rent due upon the demise is a different demand from that which some other person may have upon the occupation of the premises."[1] But equity will, even in the case of a tenant, grant relief if the persons claiming the same rent claim in privity of contract or tenure, as in the case of a mortgagor and mortgagee; of a trustee and *cestui que trust;* or where an estate is settled to the separate use of a married woman, of which the tenant has notice, and the husband has been in receipt of the rent.[2] In cases of this sort the tenant does not dispute the title of his landlord, but he affirms that title, and the tenure and contract by which the rent is payable, and puts himself upon the mere uncertainty of the person to whom he is to pay the rent.[3]

Tenant cannot file a bill against his landlord, and a stranger claiming by a paramount title; for they both do not claim the same duty.

The tenant attacked throws himself on his landlord.

Cases where a tenant may bring a bill of interpleader.

Where he does not dispute the landlord's title.

A bill of interpleader could not be filed by a sheriff who seized goods in execution, on account of the

Sheriff seizing goods could not file a bill of interpleader.

[1] *Dungey* v. *Angove*, 2 Ves. Jr. 310; *Cook* v. *Rosslyn*, 1 Giff. 167.

[2] *Hodges* v. *Smith*, 1 Cox, 357; *Clarke* v. *Byne*, 13 Ves. 383; *Johnson* v. *Atkinson*, 3 Anstr. 798.

[3] St. 812.

existence of adverse claims to the property. And this arose from the principle involved in the definition of an interpleader, "where two persons claim of a third the same debt, or the same duty;" and the sheriff, as to one of the defendants, admits himself a wrong-doer, and may be therefore liable to him for damages, as well as for the goods themselves.[1] It seems, however, that courts of equity will allow a bill of interpleader to be filed by a sheriff where there are conflicting equitable claims on the property which he has seized.[2]

He may do so where there are conflicting equitable claims.

[1] *Slingsby* v. *Boulton*, 1 V. & Bea. 335.

[2] Daniell's Ch. Pr. 1416; *Tufton* v. *Harding*, 6 Jur. N. S. 116; *Hale* v. *Saloon Omnibus Co.* 4 Drew. 492; *Dutton* v. *Furness*, 12 Jur. N. S. 386; S. C. 35 Beav. 461.

The common law courts have power to give relief, by way of interpleader, under the Stats. 1 & 2 Will. IV. c. 58; 1 & 2 Vict. c. 45; 23 & 24 Vict. c. 126, ss. 12–18.

PART V.

THE AUXILIARY AND SPECIALLY REMEDIAL JURISDICTION OF EQUITY.

CHAPTER I.

DISCOVERY.

Every bill in equity may properly be deemed a bill of discovery, since it seeks a disclosure from the defendant, on his oath, of the truth of the circumstances constituting the plaintiff's case, as propounded in his bill.

Every bill in equity is a bill of discovery.

But that which is emphatically called a bill of discovery, is a bill which asks no relief, but which simply seeks the discovery of facts resting in the knowledge of the defendant, or the discovery of deeds, or writings, or other things, in the possession or power of the defendant, in order to maintain the right or title of the party asking it, in some suit or proceeding in another court.[1]

But a bill of discovery proper asks only for discovery in aid of proceedings in another court.

In general, it seems necessary, in order to maintain a bill of discovery, that an action should be already commenced in another court, to which it should be auxiliary. There are exceptions to this rule, as where the object of discovery is to ascertain who is the proper party against whom the suit should be brought. But these are of rare occurrence.[2]

Generally an action must already be commenced.

[1] St. 1483.

[2] See *Angell* v. *Angell*, 1 Sim. & Stu. 83; *City of London* v. *Levy*, 8 Ves. 404; St. 1483.

Jurisdiction in equity arose because at law defendant could not be examined on oath, or be compelled to produce documents.

The power of the courts of equity to compel discovery arose principally from the inability of courts of common law to compel a complete discovery of the material facts in controversy by the oaths of the parties to the suit, and also by their want of power to compel the production of deeds, documents, writings, and other things which are in the custody or power of one of the parties, and are material to the right title or defence of the other.[1] Bills of discovery are greatly favoured in equity, inasmuch as they tend to assist and promote the administration of justice in others, and will be sustained in all cases where some well-founded objection does not exist against the exercise of this jurisdiction.[2]

Defences to a bill of discovery.

The principal grounds upon which a bill of discovery may be resisted are as follows:—1. That the subject is not cognisable in any court of justice. 2. That the court will not lend its aid to obtain a discovery for the particular court for which it is wanted. 3. That the plaintiff is not entitled to the discovery by reason of some personal disability. 4. That the plaintiff has no title to the character in which he sues. 5. That the value of the suit is beneath the dignity of the court. 6. That the plaintiff has no interest in the subject-matter, or title to the discovery required, or that an action will not lie for which it is wanted. 7. That the defendant is not answerable to the plaintiff, but that some other person has a right to call for the discovery. 8. That the policy of the law exempts the defendant from the discovery. 9. That the defendant is not bound to discover his own title. 10. That the discovery is not material in the suit. 11. That the defendant is a mere witness. 12. That the discovery called for would subject the defendant to a penalty, or forfeiture, or a prosecution.[3]

[1] St. 1484, 1485. [2] St. 1488. [3] St. 1489.

Plaintiff seeking discovery must appear to have a title.

It must clearly appear upon the face of the bill that the plaintiff has a title to the discovery which he seeks; a mere stranger cannot maintain a bill for the discovery of the title of another person. Hence an heir-at-law cannot, during the life of his ancestor, maintain a bill for a discovery of facts or deeds material to the ancestor's estate, for he has no present title whatsoever, but only the possibility of a future title. Even an heir-at-law has not a right to the inspection of deeds in the possession of a devisee, unless he is an heir-in-tail, in which latter case he is entitled to see the deeds creating the estate tail, but no further. And the reason of this is, that an heir-at-law has no interest in the title-deeds of an estate unless it has descended to him; whilst, on the other hand, a devisee claiming an estate under a will cannot, without a discovery of the title-deeds, maintain any suit at law.[1]

Heir-at-law during ancestor's life cannot have discovery.

But heir-in-tail entitled to see title-deeds.

The plaintiff asking for discovery must state a case which would be a good ground of action or defence.

In the next place, the party must not only show that he has an interest in the subject-matter of the bill, but he must also state a case which will, if he is the plaintiff at law, constitute a good ground of action; or if he is the defendant at law, show a good ground of defence, in answer to the action. If it is clear that the action or defence is unmaintainable at law, courts of equity will not entertain a bill for any discovery in support of it, since the discovery could not be material, but must be useless.[2]

If the matter be doubtful the court will grant the discovery.

If the point, however, be fairly open to doubt or controversy, courts of equity will grant the discovery, and leave it to courts of law to adjudicate upon the legal rights of the party seeking the discovery.[3]

[1] St. 1490–493.

[2] See *Wallis* v. *Duke of Portland*, 3 Ves. Jr. 494; *Lord Kensington* v. *Mansell*, 13 Ves. 240; St. 1493 *a*.

[3] *Thomas* v. *Tyler*, 3 Younge & Coll. Ex. 255; St. 1493 *a*.

No discovery in aid of suits not purely civil.

Courts of equity will not entertain a bill for a discovery to aid the promotion or defence of any suit which is not purely of a civil nature. Thus they will not compel a discovery in aid of a criminal prosecution, for it is against the genius of the common law to compel a party to accuse himself; and it is against the general principles of equity to aid in the enforcement of penalties and forfeitures.[1] Thus in a recent case,[2] where, on a bill filed by the United States of America, as the successors to the rights and property of the late Confederate States of America, praying for an account and relief in respect of moneys received by the defendant, as agent of the Confederate States, the defendant pleaded that by a law of the United States, the property of all persons who had acted as agents for the Confederate States was liable to confiscation, and that he could not answer without exposing himself to such confiscation, it was held that the plea was a good plea as to the discovery.

Or where it would cause a forfeiture.

No discovery in aid of another court which could exercise the same jurisdiction. Except where the other court had not that power originally.

Courts of equity will not entertain a bill for a discovery to assist a suit in another court if the latter is of itself competent to exercise the same jurisdiction. But although a party may now examine his opponent at law under the Stats. 14 & 15 Vict. c. 99, s. 2, and 17 & 18 Vict. c. 125, ss. 51, 52, and the courts of common law can now compel the production of documents under those acts, yet a plaintiff or defendant at law is still entitled to come to equity for discovery in aid of his action or defence; and this is put upon the ground that equity having once acquired jurisdiction over the subject-matter, cannot lose that jurisdiction by the mere fact of the common law courts also being invested with the same powers.[3] And courts of equity will not entertain such bills in aid of a contro-

No discovery in aid of arbitration.

[1] St. 1494.

[2] *United States of America* v. *M'Rae*, L. R. 3 Ch. 79.

[3] *Lovell* v. *Galloway*, 17 Beav. 1; *British Emp. Shipping Co.* v. *Somes*, 3 K. & J. 433.

versy pending before arbitrators, for they are not the regular tribunals authorised to administer justice; and being judges of the parties' own choice, they must submit to the inconvenience incidental thereto.[1] But courts of equity will grant a discovery in aid of a compulsory reference to arbitration ordered in an action.[2]

Except arbitration be compulsory.

No discovery will be compelled where it is against the policy of the law from the particular relation of the parties. Thus no discovery will lie against a married woman to compel her to disclose facts which may charge her husband. Nor will a person standing in the relation of professional confidence towards another be compelled to disclose the secrets of his client.[3]

Married woman cannot be compelled to disclose facts which may charge her husband. Professional confidence.

In general, arbitrators are not compellable by a bill of discovery to disclose the grounds upon which they made their award, because arbitrators are not obliged by law to give any reason for their award. But if they are charged with corruption, fraud, or partiality, they must answer that.[4]

Arbitrators not compellable to state the ground of their award.

It is ordinarily a good objection to a bill of discovery that it seeks the discovery from a defendant, who is a mere witness, and has no interest in the suit; for, as he may be examined in the suit as a witness, there is no ground to make him a party to a bill of discovery, since his answer would not be evidence against any other person in the suit.[5]

No discovery as against a witness.

A defendant may object to a bill of discovery, that he is a *bonâ fide* purchaser of the property for a valuable consideration, without notice of the plaintiff's

No discovery against a *bonâ fide* purchaser for value without notice.

[1] *Street* v. *Rigby*, 6 Vesey, 821; St. 1495.

[2] *British Emp. Shipping Co.* v. *Somes*, 3 K. & J. 433.

[3] St. 1496.

[4] St. 1498.

[5] St. 1499; Dan. Ch. Pr. 255.

claim. To entitle himself to this protection, however, the purchase must not only be *bonâ fide*, and without notice, and for a valuable consideration, but the purchase money must have been paid.[1]

Or as again a purchaser with notice from such *bonâ fide* purchaser.

And not only is a *bonâ fide* purchaser for value without notice protected in equity against a plaintiff seeking to overturn that title; but a purchaser with notice, under a *bonâ fide* purchaser without notice, is entitled to the like protection. For otherwise, it would happen that the title of such a *bonâ fide* purchaser would become unmarketable in his hands, and consequently he might be subjected to great losses, if not utter ruin.[2]

[1] See *Stanhope* v. *Earl Verney*, 2 Eden, 81; *Willoughby* v. *Willoughby*, 1 Term R. 763; St. 1502.

[2] St. 1503.

CHAPTER II.

BILLS TO PERPETUATE TESTIMONY.

I. Bills to perpetuate testimony. To preserve evidence in danger of being lost before a question can be litigated.

I. THE object of bills to perpetuate testimony is to preserve and perpetuate evidence when it is in danger of being lost, before the matter to which it relates can be made the subject of judicial investigation. Bills of this sort are obviously indispensable for the purposes of public justice, as it may be utterly impossible for a party to bring his rights presently to a judicial decision; and unless, in the meantime, he may perpetuate the proofs of those rights, they may be lost without any default on his side.[1]

The objection is, that the depositions are not published till after death of witness.

The jurisdiction which courts of equity exercise to perpetuate testimony is open to one great objection. The depositions are not published until after the death of the witnesses. The testimony, therefore, has this infirmity, that it is not given under the sanction of those penalties which the law attaches to the crime of perjury. It is for this reason chiefly that courts of equity do not generally entertain such bills, unless where it is absolutely necessary to prevent a failure of justice.[2]

If matter can be at once litigated, equity refuses to perpetuate testimony.

If, therefore, it be possible that the matter in controversy can be made the subject of immediate judicial investigation, by the party who seeks to perpetuate testimony, courts of equity will not entertain a bill for the purpose. For the party, under such cir-

[1] St. 1505.

[2] *Angell* v. *Angell*, 1 Sim. & Stu. 83; St. 1507.

cumstances, has it fully in his power to terminate the controversy, by commencing the proper action; and therefore there is no reason for giving him the advantage of deferring his proceedings to a future time, and to substitute written depositions for *vivâ voce* evidence.[1] But, on the other hand, if the party who files the bill can by no means bring the matter in controversy into immediate judicial investigation, which may happen when his title is in remainder, or when he himself is in actual possession of the property or right, with reference to which he seeks to perpetuate testimony, equity will entertain a suit for that purpose. For, otherwise, the only evidence which could support his title, possession, or rights, might be lost by the death of his witnesses; and the adverse party might purposely delay any suit to vindicate his claims, with a view to that very event.[2]

But equity will not refuse if the matter cannot by any means be at once litigated.

Equity will not perpetuate evidence of a right which may be barred.

On the principle that equity, if possible, will do nothing in vain, the court declines to perpetuate testimony in support of the right of a plaintiff, which may be immediately barred by the defendant, as in the case of a remainder-man filing a bill against the tenant in tail in possession.[3] As to the question what amount of interest the plaintiff must possess in order to entitle him to file a bill to perpetuate testimony, the law is regulated by 5 & 6 Vict., c. 69, by which it is enacted that any person who would, under the circumstances alleged by him to exist, become entitled, *upon the happening of any future event, to any honour, title, dignity, or office, or to any estate or interest in any property, real or personal*, the right or claim to which cannot by him be brought to trial before the happening of such event, shall be entitled to file a bill in Chancery, to perpetuate any testimony

What interest will entitle a plaintiff to file such a bill.

5 & 6 Vict., c. 69.

Every species of right now entitles.

[1] *Ellice* v. *Roupell* (No. 1), 32 Beav. 299.

[2] St. 1508; *Earl Spencer* v. *Peek*, L. R. 3 Eq. 415.

[3] *Dursley* v. *Fitzhardinge*, 6 Ves. 261.

which may be material for establishing such claim or right.[1]

Before this statute, a mere expectancy or *spes successionis*, as that of an heir-at-law, was not considered sufficient to sustain a bill to perpetuate testimony, though any interest, however small or remote, even though contingent, which the law would recognise, entitled a party to the relief.[2] So also, before the statute, a bill to perpetuate testimony was only allowed where some right to *property* was involved.[3]

Before the statute a mere expectancy or *spes successionis* was not enough.

And there must have been some right to property.

II. There is another species of bills, having a close analogy to that to perpetuate testimony, and often confounded with it, but which, in reality, stands upon distinct considerations. We allude to bills to take testimony *de bene esse*, and bills to take the testimony of persons resident abroad, to be used in suits actually pending in the courts. There is this broad distinction between bills of this sort and bills to perpetuate testimony, that the latter are, and can be, brought by persons only who are in possession, under their title, and who cannot sue at law, and thereby have an opportunity to examine their witnesses in such suit. But bills to take testimony *de bene esse* may be brought, not only by persons in possession, but by persons who are out of possession, in aid of the trial at law. There is also another distinction between them, which is, that bills *de bene esse* can be brought only when an action is then depending, and not before.[4]

Bills to take testimony *de bene esse*.

Can only be brought when an action is already depending.

The court will make an order for the examination of witnesses *de bene esse*, where important witnesses

[1] *Campbell* v. *Earl of Dalhousie*, L. R. 1 H. L. Sc. App. 462.

[2] *Dursley* v. *Fitzhardinge*, 6 Ves. 251.

[3] *Townshend Peerage Case*, 10 Cl. & Fin. 289.

[4] St. 1513; *Angell* v. *Angell*, 1 Sim. & Stu. 83.

Order for examination *de bene esse*, where witnesses are dangerously ill, or cannot travel, &c.

are so old and infirm that they cannot safely travel, or they are in a precarious state of health, or they are abroad at the time of trial,—in short, the court will give permission for such an examination of witnesses wherever the justice of the case appears to require it.[1]

Common law courts now have jurisdiction.

The equity jurisdiction, with reference to testimony *de bene esse*, is of considerably less practical importance, since the courts of common law have been invested with ample powers for that purpose by 13 Geo. III., c. 63, s. 44, and 1 Will. IV., c. 22, s. 1.

[1] Daniell's Ch. Pr. 816.

CHAPTER III.

BILLS *QUIA TIMET* AND BILLS OF PEACE.

I. Bills *quia timet* are in the nature of writs of prevention, to accomplish the ends of precautionary justice. They are ordinarily applied to prevent wrongs or anticipated mischiefs, and not merely to redress them when done. The party seeks the aid of the court because he fears (*quia timet*) some future probable injury to his rights or interests, and not because an injury has already occurred, which requires compensation or other relief. The manner in which this aid is given by courts of equity is, of course, dependent on circumstances. Sometimes they interfere by the appointment of a receiver to receive rents or other income; sometimes by an order to pay a pecuniary fund into court, sometimes by directing security to be given, or money to be paid over, and sometimes by the mere issuing of an injunction, or other remedial process, thus adapting their relief to the precise nature of the particular case, and the remedial justice required by it.[1]

I. *Quia timet.*

In order to prevent wrongs.

Appointment of receivers.

Directing security to be given.

II. Bills of peace sometimes bear a resemblance to bills *quia timet.* Bills *quia timet*, however, are distinguishable from the former in several respects, and are always used as a preventive process, before a suit is actually instituted; whereas bills of peace, although sometimes brought before any suit is instituted to try a right, are most generally brought after the right has been tried at law.[2]

II. Bills of peace.

Are generally brought after a right has been tried.

[1] St. 826.

[2] St. 852.

Definition.

By a bill of peace we are to understand a bill brought by a person to establish and perpetuate a right which he claims, and which, from its very nature, may be controverted by different persons, at different times, and by different actions; or where separate attempts have already been unsuccessfully made to overthrow the same right, and justice requires that the party should be quieted in the right, if it is already sufficiently established; or if it should be sufficiently established under the direction of the court. The obvious design of such a bill is to secure repose from perpetual litigation, and is founded on the general doctrine of public policy, which in some form or other may be found in the jurisprudence of every civilised country, that an end ought to be put to litigation, and above all to fruitless litigation; *interest reipublicæ ut sit finis litium.*[1]

Bills of peace are in order to quiet a person's right.

Interest reipublicæ ut sit finis litium.

Where a general right is to be established against many.

One class of cases, to which this remedial process is properly applied, is where there is one general right to be established against a great number of persons. And it may be resorted to either where one person claims or defends a right against many, or where many claim or defend a right against one.[2] Courts of equity having a power to bring all the parties before them, will, in order to prevent multiplicity of suits, at once interpose, and proceed to the ascertainment of the general right; and if it be necessary, they will ascertain it by an action or issue at law, and then make a decree finally binding on all the parties.[3]

Court of equity can bring all the parties before it.

Illustrations.

Bills of this nature may be brought by a lord against tenants for an encroachment under colour of a common right; by a party in interest to establish a toll due by custom, or his rights to the profits of a fair.[4] So

[1] St. 853.
[2] *Sheffield Waterworks* v. *Yeomans*, L. R. 2 Ch. 8.
[3] St. 854.
[4] St. 855.

where a party has possession, and claims a right of fishing for a considerable distance in a river, and the riparian proprietors set up several adverse rights, he may have a bill of peace against all of them to establish his right and quiet his possession.[1] Thus, in *The Sheffield Waterworks* v. *Yeomans*,[2] a bill was brought against Y. and five other defendants, on behalf of themselves and all other the persons named in certain alleged certificates, praying in effect that the certificates might be declared void, and be delivered up to be cancelled. The facts of the case, which arose out of the bursting of a reservoir belonging to the plaintiff company, were as follows:—Under the Sheffield Waterworks Act 1864, which was passed to provide machinery for the assessment by commissioners of the claims of sufferers by the inundation, upwards of 7000 claims for compensation had been considered, and certificates issued for the costs of assessing damages; which, under the provisions of the act, carried with them a summary remedy against the company on default of payment of the amount therein certified to be due to the holder. Questions, however, had arisen as to the validity of 1500 of the certificates which had been delivered to the defendant Y., town-clerk of Sheffield, on behalf of various claimants. The question as to the validity of these certificates was the question to be decided in the suit. It was held on demurrer, that, though the claims of the defendants were not identical, yet, as they all involved the same question of validity, the bill would lie, as in the nature of a bill of peace, and the demurrer was accordingly overruled.

Sheffield Waterworks v. Yeomans.

Another class of cases to which bills of peace are now ordinarily applied, is where the plaintiff has, after repeated and satisfactory trials, established his right

Where a party has conclusively established a

[1] *Mayor of York* v. *Pilkington*, 1 Atk. 282.

[2] L. R. 2 Ch. 8.

right, and is threatened with fresh litigation.

at law, and yet is in danger of further litigation and obstruction to his right from new attempts to controvert it. Under such circumstances courts of equity will interfere, and grant a perpetual injunction to quiet the possession of the plaintiff, and to suppress future litigation of the right. In a celebrated case,[1] where the title to land had been five several times tried in an ejectment, and five verdicts given in favour of the plaintiff, the House of Lords granted a perpetual injunction, upon the ground that it was the only adequate means of suppressing oppressive litigation and irreparable mischief. Courts of equity will not, however, interfere in such cases before a trial at law, nor until the right has been satisfactorily established at law. And now, by Stat. 21 & 22 Vict. c. 27, known as Lord Cairns' Act, the Court of Chancery is enabled to try questions of fact, with or without a jury; and therefore need not, in such a case, send a plaintiff to law in order to establish his right. And by Sir John Rolt's Act (25 & 26 Vict. c. 42, s. 2), the Court of Chancery may in its discretion direct an issue to be tried at the assizes or at *nisi prius*, where the circumstances render such a course advisable.

Ejectment.

Court of Chancery may try questions of fact itself.

Or direct an issue at law.

No perpetual injunction in favour of a private right in contravention of a public right.

It seems that courts of equity will not, upon a bill of this nature, decree a perpetual injunction for the establishment or the enjoyment of the right of a party who claims in contradiction to a public right, as if he claims an exclusive right to a highway, or to a common navigable river; for it is said this would be to enjoin all the people of the state or country. But the true principle is, that courts of equity will not, in such cases, upon principles of public policy, intercept the assertion of public rights.[2]

[1] *Earl of Bath* v. *Sherwin*, Prec. Ch. 261; 4 Bro. P. C. 273.

[2] St. 858.

CHAPTER IV.

CANCELLING AND DELIVERY UP OF DOCUMENTS.

Instrument ordered to be delivered up —when?

THE Court of Chancery frequently cancels or rescinds, or orders the delivery up of instruments which have answered the end for which they were created, or instruments which are voidable, or instruments which are in reality void, and yet apparently valid.[1] It is obvious that the jurisdiction exercised in cases of this sort is founded upon the administration of a protective or preventive justice. The party is relieved upon the principle, *quia timet;* that is, for fear that such instruments may be vexatiously or injuriously used against him, when the evidence to impeach them may be lost; or that they may now throw a cloud or suspicion over his title or interest.[2]

On principle *quia timet.*

Granting of such a decree not a matter of right, but of discretion in the court.

The application to the court for this purpose is, as in cases of specific performance, not a matter of absolute right upon which the court is bound to pass a final decree, but it is matter of sound discretion to be exercised by the court, either in granting or refusing the relief prayed, according to its own notion of what is proper. Thus, a court of equity will sometimes refuse to decree a specific performance of an agreement, which it will yet decline to order to be delivered up, cancelled, or rescinded, and an agreement will be rescinded or cancelled upon the application of one party when the court would decline any interference at the instance of the other.[3]

[1] Sm. Man. 386.

[2] St. 694; *Cooper* v. *Joel*, 27 Beav. 313; *W*—— v. *B*——, 32 Beav. 574; *Onions* v. *Cohen*, 2 H. & M. 354.

[3] St. 693.

Voluntary deed or agreement.

Thus, again, in the case of voluntary deeds or agreements, not obtained by fraud, which, although not enforceable in a court of equity, will not ordinarily be set aside, it has been quaintly laid down in an old case:—"That, if a man will improvidently bind himself up by a voluntary deed, and not reserve a liberty to himself by a power of revocation, a court of equity will not loose the fetters he hath put on himself, but he must lie down under his own folly."[1] But this doctrine has been somewhat narrowed by later decisions, and it has been laid down, that the absence of a power of revocation throws upon the person seeking to uphold the deed, the onus of proving that such power was intentionally excluded by the donor, and in the absence of such proof the deed may be set aside.[2]

If court grants relief, it does so on terms.

And in all cases where the court does grant relief, it will impose such terms as it may think fit upon him, and if the plaintiff refuses to comply with such terms, his bill will be dismissed,—the maxim, he who seeks equity must do equity, being emphatically applied.[3]

Where plaintiff has good defence to an instrument in equity, though not at law.

A party will have a right to come into equity to have agreements, deeds, or securities cancelled, rescinded, or delivered up, where he has a defence to them good in equity, but not capable of being made available at law.[4]

Voidable instruments when cancelled.

Courts of equity will generally set aside and cancel agreements and securities where they are voidable, and not merely void, under the following circumstances:[5]—

1. Where there is actual fraud in the party defendant, in which the party plaintiff has not participated.

2. Where there is a constructive fraud against public

[1] See *Villers* v. *Beaumont*, 1 Vern. 101; *Bill* v. *Cureton*, 2 My. & K. 503; *Petre* v. *Espinasse*, 2 My. & K. 496.

[2] *Coutts* v. *Acworth*, L. R. 8 Eq. 558; *Wollaston* v. *Tribe*, L. R. 9 Eq. 44.

[3] St. 693.

[4] St. 694.

[5] St. 695.

policy, and the party plaintiff has not participated therein.

3. Where there is a constructive fraud against public policy and the party plaintiff has participated therein, but public policy would be defeated by allowing it to stand.

4. Where there is a constructive fraud in both parties, but they are not *in pari delicto.*

The first two classes of these cases do not require any illustration, since it is manifestly a result of natural justice that a party ought not to be permitted to avail himself of any instrument, deed, or agreement, procured by his own actual or constructive fraud, or by his own violation of legal duty or public policy to the prejudice of an innocent party.[1]

Party cannot avail himself of an instrument obtained by his own fraud.

The third class may be illustrated by the case of a gaming security, which will be decreed to be delivered up, notwithstanding both parties have participated in a violation of the law, because public policy will be best served by such a course.[2]

Gaming security decreed to be cancelled though both are guilty.

The fourth class may also be illustrated by cases where, although both parties have participated in the guilty transaction, yet the party who seeks relief has acted under circumstances of oppression, imposition, hardship, undue influence, or great inequality of age or condition, so that in a moral as well as a legal point of view his guilt may well be deemed far less dark in its character and degree than that of his associate.[3]

Where, though both are *participes criminis,* one has been so under oppression or undue influence.

On the other hand, where the party seeking relief is the sole guilty party, or where he has participated

No relief to a guilty party against one whom he has deceived.

[1] St. 695 *a.*

[2] *Earl of Milltown* v. *Stewart,* 3 Mylne & Craig, 18; *W*—— v. *B*——, 32 Beav. 574; *Quarrier* v. *Colston,* 1 Phillips, Ch. R. 147.

[3] St. 695 *a.*

equally and deliberately in the fraud, or where the agreement which he seeks to set aside is founded on illegality, immorality, or base and unconscionable conduct on his own part; in such cases courts of equity will leave him to the consequences of his own iniquity, and will decline to assist him to escape from the toils which he has studiously prepared to entangle others, or whereby he has sought to violate with impunity the best interests and morals of social life.[1]

Instruments absolutely void.

A question has often occurred how far courts of equity would or ought to interfere to direct deeds and other solemn instruments to be delivered up and cancelled, which are utterly void, and not merely voidable. The doubt has been, in the first place, whether, as an instrument utterly void is incapable of being enforced at law, it is not a case where the remedial justice to protect the party may not be deemed adequate and complete at law, and therefore, where the necessity of the interposition of courts of equity is obviated; and in the next place, whether the more appropriate remedy would not be, the granting a perpetual injunction to restrain the use of the instrument.[2]

Will be decreed to be delivered up.

But whatever may have been the doubts and difficulties formerly entertained upon this subject, they seem by the more modern decisions to be fairly put at rest, and the jurisdiction is now maintained to the fullest extent.[3] And these decisions are founded on the true principles of equity jurisprudence, which is not merely remedial, but is also preventive of injustice. If an instrument ought not to be used or enforced, it is against conscience for the party holding it to retain

[1] *Franco* v. *Bolton*, 3 Ves. Jr. 368, 372; *St John* v. *St John*, 11 Ves. 535, 536; St. 697.

[2] St. 698; *Hilton* v. *Barrow*, 1 Vesey Jr. 284; *Ryan* v. *Mackmath*, 3 Bro. C. C. 15, 16.

[3] Mr Swanston's note to *Davis* v. *Duke of Marlborough*, 2 Swanst. 157.

it, since he can only retain it for some sinister purpose. If it is a negotiable instrument, it may be used for a fraudulent or improper purpose to the injury of a third person. If it is a deed purporting to convey lands or other hereditaments, its existence in an uncancelled state necessarily has a tendency to throw a cloud over the title. If it is a mere written agreement, solemn or otherwise, while it exists it is always liable to be applied to improper purposes, and it may be vexatiously litigated at a distance of time, when the proper evidence to repel the claim may have been lost or obscured.[1] But where the illegality of the agreement, deed, or other instrument appears upon the face of it, so that its nullity can admit of no doubt, the same reason for the interference of a court of equity, to direct it to be cancelled or delivered up, would not seem to apply, for in such a case there can be no danger that the lapse of time may deprive the party of his full means of defence; nor can it in a just sense be said that such a paper can throw a cloud over his right or title, or diminish his security; nor is it capable of being used as a means of vexatious litigation or serious injury. And, accordingly, it is now fully established that in such cases courts of equity will not interpose their authority to order a cancellation or delivery up of such instruments.[2]

Negotiable instrument.

But where the illegality appears on its very face, equity will not interfere.

The whole doctrine of courts of equity on this subject is referable to the general jurisdiction, *quia timet*. It is not confined to cases where the instrument having been executed is void upon grounds of law or equity. But it is applied even in cases of forged instruments, which may be decreed to be given up without any prior trial at law on the point of forgery.[3]

Forged documents ordered to be delivered up.

[1] St. 700; *Bromley* v. *Holland*, 7 Ves. 20, 21; *Kemp* v. *Prior*, 7 Ves. 248, 249.

[2] *Simpson* v. *Lord Howden*, 3 Mylne & Cr. 97; *Bromley* v. *Holland*, 7 Ves. 16; *Threlfall* v. *Lunt*, 7 Sim. 627; *Hurd* v. *Billington*, 6 Gr. 145; St. 700 *a*.

[3] *Peake* v. *Highfield*, 1 Russ. 559; St. 701.

CHAPTER V.

BILLS TO ESTABLISH WILLS.

Court of probate. Equity deals with wills incidentally.

ALTHOUGH courts of equity have no general jurisdiction over wills, the proper court being the Court of Probate,[1] in which all wills of personalty are required to be proved, yet whenever a will comes incidentally into question before them, as when the court is called to execute the trusts of the will, or to marshall assets, they necessarily entertain *jurisdiction* to some extent over the subject.[2] If the validity of the will is admitted, or already established, they act upon it to the fullest extent. But if the parties are dissatisfied with the probate, and contest the validity of the will, the court of equity in which the cause is depending will cause the validity of the will to be established;[3] and if the will be established, a perpetual injunction may be decreed.[4]

Devisee may come into equity to establish a will against heir-at-law.

But it is often the primary though not the sole object of a suit in equity to be brought by devisees and others, to establish the validity of a will of real estate, and, thereupon, to obtain a perpetual injunction against the heir-at-law, and others, to prevent them from contesting its validity in future.[5] In such cases the jurisdiction exercised by courts of equity is somewhat analogous to that exercised in cases of bills of peace; and is founded upon the like considerations, in order to suppress interminable litigation, and to give security and repose to titles.[6]

1 20 & 21 Vict. c. 77, ss. 61, 62.
2 *Sheffield* v. *Duchess of Buckinghamshire*, 1 Atk. 630.
3 25 & 26 Vict. c. 42.
4 St. 1445–7.
5 *Bootle* v. *Blundell*, 19 Ves. 494, 509.
6 St. 1447.

In the case of *Boyse* v. *Rossborough*,[1] it was decided that a devisee in possession was entitled to have the will established against the heir-at-law of the testator, although the heir had brought no action of ejectment against the devisee, although no trusts were declared by the will, and although it was not necessary to administer the estate under the direction of the Court of Chancery. And it has been further determined that the Court of Chancery has power to establish a will against parties claiming under a prior will, and disputing the plaintiff's claim, a devisee being entitled to have the will established, and his title quieted, not only as against the heir but against all persons setting up adverse rights.[2]

Even though the heir-at-law has brought no ejectment.

Devisee may establish a will against all setting up an adverse right.

But, on the other hand, the heir-at-law can only come into a court of equity by consent to have the validity of the will tried. He cannot come into equity unless by consent, because he has a legal remedy by ejectment: if there are any impediments to the proper trial of the merits of such an ejectment, he may come into equity to have them removed.[3] And now, on a bill by an heir, praying an issue *devisavit vel non*, for the purpose of obtaining incidental relief, the court may, under 25 & 26 Vict. c. 42, s. 2, determine the question itself, or in its discretion may direct an issue to be tried at law, and in these cases the heir is entitled as of right to a trial by jury.[4]

The heir-at-law can only come into equity by consent.

[1] Kay, 71; 1 K. & J. 124; 3 De G. M. & G. 817; 6 H. L. Cas. 1.

[2] *Lovett* v. *Lovett*, 3 K. & J. 1.

[3] Sm. Man. 397.

[4] Dan. Ch. Pr. 938, 945; *Banks* v. *Goodfellow*, L. R. 11 Eq. 472.

CHAPTER VI.

"NE EXEAT REGNO."

To prevent a person leaving the realm.

THE writ of *Ne exeat regno* is a prerogative writ, which is issued, as its name imports, to prevent a person from leaving the realm; and, in its origin, was only applied to great political objects and purposes of state, for the safety and benefit of the realm.[1]

Regulated by usage.

The ground upon which this writ is applicable to civil cases is regulated by custom and usage, and it is therefore impossible to expound its true use or application upon principle. It is applied to private cases with great caution and jealousy.[2]

Granted only in cases of equitable debts.

In general it may be stated, that the writ of *Ne exeat regno* will not be granted unless in cases of equitable debts and claims; for, in regard to civil rights, it is treated as in the nature of equitable bail. If therefore the debt be one demandable at law, the writ will be refused; for in such a case the remedy at law is open to the party. If bail may be required, it can be insisted on in the action at law; if not required at law, that furnishes no ground for the interference of a court of equity, to do what in effect, as to legal demands, the law inhibits.[3]

Exceptions.

It has been already said that, in general, the writ of *Ne exeat regno* lies only upon equitable debts and claims. There are to this general rule two recognised exceptions.

[1] St. 1465–67.
[2] St. 1468.
[3] St. 1470.

1. Where alimony is decreed to a wife, it will be enforced against a husband by a writ of *Ne exeat regno*, if he is about to quit the realm. But the alimony must be actually decreed. If the case is a *lis pendens*, courts of equity will abstain from granting the writ.[1]

1. In cases of alimony decreed, where husband intends leaving the jurisdiction.

2. Where there is an admitted balance due by the defendant to the plaintiff, but a larger sum is claimed by the latter, the writ will be issued, for there is not any real deviation from the appropriate jurisdiction of courts of equity; for matters of account are properly cognisable therein. The writ of *Ne exeat regno* may, therefore, well be supported as a process in aid of the concurrent jurisdiction of courts of equity.[2]

2. In cases where there is an admitted balance, but plaintiff claims a larger sum.

As to the nature of the equitable demand for which a writ of *Ne exeat regno* will be issued, it must be certain as to its nature, and actually payable, and not contingent. It should also be for some debt or pecuniary demand. It will not be issued, therefore, in a case where the demand is of a general unliquidated nature, or is in the nature of damages.[3]

The debt must be certain in its nature.

[1] St. 1472.
[2] St. 1473.
[3] St. 1474.

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EDINBURGH AND LONDON